



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 3  
130 S Elmwood Ave Ste 630  
Buffalo, NY 14202-2465

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
Telephone: (716)551-4931  
Fax: (716)551-4972



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January 22, 2021

**URGENT**

Workers United Local 2833  
115 E State St.  
Ithaca, NY 14850

Re: Gimme Coffee, Inc.  
Case 03-RD-271639

Dear Sir or Madam:

Enclosed is a copy of a petition that Courtney Susan Shelton filed with the National Labor Relations Board (NLRB) seeking an election involving certain employees for which you are the exclusive collective bargaining representative. Please read this letter carefully to make sure you are aware of the union's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the Employer's requirement to post and distribute the Notice of Petition for Election, the requirement that you complete and serve a Statement of Position Form, the petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed, your right to be represented, and NLRB procedures, including how to submit documents.

**Investigator:** This petition will be investigated by Field Examiner THOMAS A. MILLER whose telephone number is (716)398-7004. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Regional Attorney LINDA M. LESLIE whose telephone number is (716)398-7017. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

**The Union's Required Statement of Position:** In accordance with Section 102.63(b) of the Board's Rules, the union is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time on February 3, 2021**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon Eastern**

**Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

*Failure to Supply Information:* Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

**The Employer's Required Statement of Position:** In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time on February 3, 2021**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon Eastern Time.**

*List(s) of Employees:* The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also

indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

**Responsive Statement of Position:** In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing the issues raised in the Statement of Position. The petitioner must file a completed, signed copy in response to any timely filed and served Statement of Position by any party, with any necessary attachments, with this office and serve it on all parties named in the petition, such that it is received no later than **noon Eastern Time on February 8, 2021.**

**Notice of Hearing:** Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM on Thursday, February 11, 2021 Via Zoom teleconference call**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

**Posting and Distribution of Notice:** The Employer must post the enclosed Notice of Petition for Election by January 29, 2021 in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

**Other Information Needed Now:** Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) The correct name of the Union as stated in its constitution or bylaws.

- (b) A copy of any existing or recently expired collective-bargaining agreements, and any addenda or extensions, or any recognition agreements covering any employees in the petitioned-for unit.
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

**Voter List:** If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

**Right to Representation:** You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, [www.nlr.gov](http://www.nlr.gov), or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

**Procedures:** Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site ([www.nlr.gov](http://www.nlr.gov)). You must e-file all documents electronically or provide a

written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, [www.nlr.gov](http://www.nlr.gov), or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



PAUL J. MURPHY  
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

cc: Gary J. Bonadonna JR.  
Rochester Regional Joint Board  
750 East Ave  
Rochester, NY 14607-2100

Ian Hayes, ESQ.  
Creighton, Johnsen & Giroux  
1103 Delaware Avenue  
Buffalo, NY 14209



## National Labor Relations Board



# NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that Courtney Susan Shelton has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 03-RD-271639 seeking an election to determine if the employees of Gimme Coffee, Inc. in the unit set forth below wish to be represented by Workers United Local 2833 for the purposes of collective bargaining:

**Included:** All full-time, part-time, and variable hour employees with the job title "Barista" including Lead Baristas, employed by Gimme! Coffee at its facilities in Ithaca and Trumansburg  
**Excluded:** Store managers, confidential employees, professional employees, and supervisors as defined in the National Labor Relations Act, and all other non-barista employees.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

## YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

## PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

**IF AN ELECTION IS HELD**, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

# ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to [www.nlr.gov](http://www.nlr.gov) or contact the NLRB at (716)551-4931.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



## National Labor Relations Board





**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**



<b>Gimme Coffee, Inc.</b>  <b>Employer</b>  <b>and</b> <b>Courtney Susan Shelton</b>  <b>Petitioner</b>  <b>and</b> <b>Workers United Local 2833</b>  <b>Union</b>	<b>Case 03-RD-271639</b>
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**NOTICE OF REPRESENTATION HEARING**

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Thursday, February 11, 2021** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located Via Zoom teleconference call, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Gimme Coffee, Inc. and Workers United Local 2833 must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on February 03, 2021. Following timely filing and service of a Statement of Position by Gimme Coffee, Inc. and Workers United Local 2833, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such they are received by them no later than **noon** Eastern on February 08, 2021.

**Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website ([www.nlrb.gov](http://www.nlrb.gov)), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining**

why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: January 22, 2021

/s/Paul J. Murphy

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PAUL J. MURPHY  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 03  
130 S Elmwood Ave Ste 630  
Buffalo, NY 14202-2465

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>Gimme Coffee, Inc.</b>  <b>Employer</b>  <b>and</b> <b>Courtney Susan Shelton</b>  <b>Petitioner</b>  <b>and</b> <b>Workers United Local 2833</b>  <b>Union</b>	<b>Case 03-RD-271639</b>
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**AFFIDAVIT OF SERVICE OF: Petition dated January 22, 2021, Notice of Representation Hearing dated January 22, 2021, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 22, 2021, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Ian Hayes, ESQ.  
Creighton, Johnsen & Giroux  
1103 Delaware Avenue  
Buffalo, NY 14209  
ihayes@cpjglaborlaw.com  
Fax: (716)854-0004

Gary J. Bonadonna JR.  
Rochester Regional Joint Board  
750 East Ave  
Rochester, NY 14607-2100

Workers United Local 2833  
115 E State St.  
Ithaca, NY 14850

PAUL E. WAGNER, ESQ.  
Stokes Wagner  
One Atlantic Center, Suite 2400  
1201 West Peachtree Street NW  
Atlanta, GA 30309  
pwagner@stokeswagner.com  
Fax: (607)257-6293

Colleen Anunu, CEO  
Gimme Coffee, Inc.  
3201 Krums Corners Rd. Ithaca, NY 14850  
Ithaca, NY 14850  
colleen.anunu@gimmecoffee.com

Courtney Susan Shelton  
77 W Main St  
Trumansburg, NY 14886  
cs2424@nau.edu

January 22, 2021

Date

Andrea Seyfried, Designated Agent of NLRB

Name

/s/ Andrea Seyfried

Signature

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES  
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

**Right to be Represented** – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at [www.nlr.gov](http://www.nlr.gov) or forward it to the NLRB Regional Office handling the petition as soon as possible.

**Filing and Service of Petition** – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

**Notice of Hearing** – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

**Hearing Postponement:** Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website ([www.nlr.gov](http://www.nlr.gov)) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

**Statement of Position Form and List(s) of Employees** – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional

form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx)

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

**Responsive Statement of Position** – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

**Posting and Distribution of Notice of Petition for Election** – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

**Election Agreements** – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

**Hearing Cancellation Based on Agreement of the Parties** – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

**Hearing** – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

**Purpose of Hearing:** The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

**Issues at Hearing:** Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

**Preclusion:** At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

**Conduct of Hearing:** If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

**Official Record:** An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

**Motions and Objections:** All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

**Election Details:** Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

**Oral Argument and Briefs:** Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, [www.nlr.gov](http://www.nlr.gov).

**Regional Director Decision** - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

**Voter List** – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**Waiver of Time to Use Voter List** – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

**Election** – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

**Withdrawal or Dismissal** – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

## **REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM**

**Completing and Filing this Form:** The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must EFile your Statement of Position at [www.nlrb.gov](http://www.nlrb.gov), but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

**Note:** *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7.*

**Required Lists:** The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

**Consequences of Failure to Supply Information:** Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**STATEMENT OF POSITION**

**DO NOT WRITE IN THIS SPACE**

Case No.

03-RD-271639

Date Filed

January 22, 2021

**INSTRUCTIONS:** Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

**Note:** Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7.

1a. Full name of party filing Statement of Position		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)		1d. Cell No.:	1f. e-Mail Address
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.			
Added		Excluded	
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at <a href="http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx">www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx</a> . (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be <i>added</i> to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be <i>excluded</i> from the proposed unit to make it an appropriate unit. (Attachment D)			
8a. State your position with respect to the details of any election that may be conducted in this matter. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s)	8c. Time(s)	8d. Location(s)	
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)	
<b>9. Representative who will accept service of all papers for purposes of the representation proceeding</b>			
9a. Full name and title of authorized representative	9b. Signature of authorized representative		9c. Date
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:		9g. Fax No.	9h. Cell No.

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

## QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME		CASE NUMBER 03-RD-271639	
1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)			
2. TYPE OF ENTITY			
<input type="checkbox"/> CORPORATION <input type="checkbox"/> LLC <input type="checkbox"/> LLP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> SOLE PROPRIETORSHIP <input type="checkbox"/> OTHER (Specify )			
3. IF A CORPORATION or LLC			
A. STATE OF INCORPORATION OR FORMATION		B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES	
4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS			
5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR			
6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).			
7A. PRINCIPAL LOCATION:		7B. BRANCH LOCATIONS:	
8. NUMBER OF PEOPLE PRESENTLY EMPLOYED			
A. TOTAL:		B. AT THE ADDRESS INVOLVED IN THIS MATTER:	
9. DURING THE MOST RECENT (Check the appropriate box): <input type="checkbox"/> CALENDAR <input type="checkbox"/> 12 MONTHS   or <input type="checkbox"/> FISCAL YEAR (FY DATES )			
		YES	NO
A. Did you <b>provide services</b> valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$ _____			
B. If you answered no to 9A, did you <b>provide services</b> valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided. \$ _____			
C. If you answered no to 9A and 9B, did you <b>provide services</b> valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$ _____			
D. Did you <b>sell goods</b> valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$ _____			
E. If you answered no to 9D, did you <b>sell goods</b> valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$ _____			
F. Did you <b>purchase and receive goods</b> valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$ _____			
G. Did you <b>purchase and receive goods</b> valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$ _____			
H. <b>Gross Revenues</b> from all sales or performance of services (Check the largest amount) <input type="checkbox"/> \$100,000 <input type="checkbox"/> \$250,000 <input type="checkbox"/> \$500,000 <input type="checkbox"/> \$1,000,000 or more   If less than \$100,000, indicate amount.			
I. Did you <b>begin operations within the last 12 months?</b> If yes, specify date: _____			
10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?			
<input type="checkbox"/> YES <input type="checkbox"/> NO (If yes, name and address of association or group).			
11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS			
NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER
12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE			
NAME AND TITLE (Type or Print)	SIGNATURE	E-MAIL ADDRESS	DATE

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

## **REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM**

**Completing and Filing this Form:** For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the list described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must E-File your Responsive Statement of Position at [www.NLRB.gov](http://www.NLRB.gov), but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from [www.NLRB.gov](http://www.NLRB.gov), the form will lock upon signature and no further editing may be made.**

**Required List:** In addition to responding to the issues raised in another party's Statement of Position, if any, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. This list must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the list in the required form, the list must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

**Consequences of Failure to Submit a Responsive Statement of Position:** Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**RESPONSIVE STATEMENT OF POSITION – RC, RD or RM PETITION**

**DO NOT WRITE IN THIS SPACE**

Case No.  
03-RD-271639

Date Filed  
January 22, 2021

**INSTRUCTIONS:** If a party has submitted and served on you a timely Statement of Position to an RC, RD or RM petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner. The Petitioner-Employer in a RM case is required to file this Responsive Statement of Position and include an appropriate employee list without regard to whether another party has filed a Statement of Position.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

**The Employer**

**An Intervenor/Union**

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone

1d. Cell No.

1e. Fax No.

1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

**a. EMPLOYER NAME/IDENTITY** [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**b. JURISDICTION** [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**c. APPROPRIATENESS OF UNIT** [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**d. INDIVIDUAL ELIGIBILITY** [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**e. BARS TO ELECTION** [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**f. ALL OTHER ISSUES** [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

**g. ELECTION DETAILS** [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative

Signature of Authorized Representative

Date

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

**Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION

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In the Matter of:

GIMME COFFEE, INC.

Employer,

-and-

Case No. 03-RD-271639

COURTNEY SUSAN SHELTON,

Petitioner,

-and-

WORKERS UNITED LOCAL 2833,

Union.

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**OBJECTION**

Workers United Local 2833 (herein “Union”) hereby files the following Objection to conduct in the above-captioned decertification election held by mail ballot and tallied on March 17, 2021:

On or around November 30, 2020 and/or thereafter, following an unsuccessful decertification filed by Petitioner Courtney Susan Shelton, Gimme Coffee, Inc. (hereinafter “Employer”) terminated the recall rights of fourteen (14) employees who were on temporary layoff and who had placed themselves on a waitlist to be recalled to work, pursuant to the parties’ collective bargaining agreement and an agreement between the parties entitled Effects Bargaining and COVID-19 Agreement, and the Memorandum of Agreement August 27, 2020. In terminating the waitlisted employees’ recall rights, the Employer attempted to prevent employees on the waitlist from being able to vote in the decertification election, knowing that the majority of employees on the waitlist were supporters of the Union. By these same actions, the employer knowingly and deliberately fostered division between employees who had already been recalled to work, and employees who were on the waitlist, the majority of whom were Union supporters. Furthermore, the Employer’s actions further

entrenched the impression that being on the waitlist meant supporting the Union, and discouraged actively working employees from voting for the Union in the instant election.

Dated: Buffalo, New York  
March 23, 2021

  
\_\_\_\_\_  
Ian Hayes, Esq.  
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UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Gimme Coffee, Inc.  
Employer

and

Courtney Susan Shelton  
Petitioner

and

Workers United Local 2833  
Union

Case No. 03-RD-271639 Date Filed 1/22/21

Date Issued 3/17/2022

City Buffalo State New York

(If applicable check either or both:)

Type of Election:  
(Check one:)

☒ Stipulation  
☐ Board Direction  
☐ Consent Agreement  
☐ RD Direction Incumbent Union (Code)

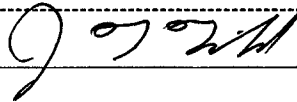
☐ 8(b) (7)  
☒ Mail Ballot

## TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 31
2. Number of Void ballots 0
3. Number of Votes cast for Workers United Local 2833 4
4. Number of Votes cast for
5. Number of Votes cast for
6. Number of Votes cast against participating labor organization(s) 7
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 11
8. Number of challenged ballots 10
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 21
10. Challenges are sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for

For the Regional Director



The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

- For Gimme Coffee, Inc.  
Paul E. Wagner Esq. participated by video conference due to pandemic.
- For Courtney Susan Shelton  
Did not participate
- For Workers United Local 2833  
Ian Hayes Esq. participated by video conference due to pandemic.

**BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3  
Hearing September 2-3, 2021**

In the Matter of:

<b>GIMME! COFFEE, INC.,</b>	)	
	)	
Employer,	)	Case No. 03-RD-271639
	)	
and	)	
	)	
<b>COURTNEY SUSAN SHELTON,</b>	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
<b>WORKERS UNITED LOCAL 2833,</b>	)	
	)	
Union,	)	
_____	)	

**POST-HEARING BRIEF OF THE EMPLOYER, GIMME! COFFEE, INC.**

The COVID-19 pandemic forced the Respondent Gimme! Coffee, Inc., like so many other businesses, to close a number of stores and overhaul completely its way of doing business in order to survive. By September 2020, it had reopened a few stores in a limited fashion, and the employees realistically understood that any other openings would depend on the progression of the pandemic and other factors largely outside the Respondent's control. The nine voters whose ballots are challenged chose to remain unemployed after September 2020 and consequently had no reasonable expectation of recall by the time of the election. Their ballots should be rejected.

**STATEMENT OF THE FACTS**

Prior to the COVID-19 pandemic, the Respondent had a total of seven coffee shops, plus a separate bakery facility. Two coffee shops were in downtown Ithaca, New York, about ¾ of a

mile apart; one was on Cayuga Street,<sup>1</sup> and the other was on Martin Luther King Jr. Street. Another was in the nearby town of Trumansburg; another called “Community Corners” was located near Cornell University; and finally, the Respondent also had a kiosk in Gates Hall, a Cornell University building. There were two shops in New York City as well. Tr. 21-22. Before the pandemic, all were dine-in coffee shops with food service – even the Gates Hall kiosk on Cornell campus had a great deal of seating in the lobby. Tr. 22. Prior to the onset of the closures necessitated by the pandemic, about 66 percent of the Respondent’s baristas worked part time (*i.e.*, fewer than 30 hours a week) and about 33 percent of baristas were full time – over 30 hours a week. Tr. 22. In other words, there were about 20 full-time equivalent baristas at all Ithaca-area locations prior to the COVID closure, with a total of 32 active baristas. Tr. 22-23.

In March of 2020, as the COVID-19 pandemic swept the nation and the world, the Respondent decided to close all of its stores, because it did not have any idea at that time of how to operate safely for the sake of its employees or its customers. The two stores in New York City were closed first; the stores in and around Ithaca were closed about a week later. Tr. 23-24. The Ithaca-area stores closed effective March 25, 2020. Tr. 23-24. Because the future of the business was in doubt at that time, the Respondent elected to terminate all of its employees. Tr. 24-26; Exh. E-3; *see also* Exh. E-11 (list of all terminated baristas and lead baristas through January 31, 2021). By request from the Union, the Respondent agreed to send follow-up letters after the initial termination letters clarifying that the employees’ termination was due to COVID-19, not to any wrongdoing on their part. Tr. 94-95.

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<sup>1</sup> Prior to the COVID-19 pandemic, the Cayuga store was staffed by only two full-time workers; the rest (about 8-10) were part-time. Tr. 216-217.

In April of 2020, the Respondent started to plan for delivery and an online-order-only program, which entailed having door service only at the MLK store and limited “pods” of people working with each other to limit potential exposure to the virus. Tr. 27-29.

After the March closure, the Respondent began to engage in “effects” bargaining with the Union. Tr. 48-49. A dispute arose surrounding the potential recall of baristas because recalls had traditionally been by store seniority, but the Union wanted recall in this instance to be by company-wide seniority. The Union was concerned with making sure that former employees who did not want to return could keep their unemployment insurance; it therefore did not want them to have to turn down any job offers from the Respondent. *Id.* Thus, the initial proposal of going down the seniority list to make job offers was rejected. Tr. 49-50. The Union initially requested that the list of those who chose not to return not be shared with the unemployment bureau, but the Respondent felt uncomfortable with this, believing it could potentially amount to fraud. Tr. 50.

In July 2020, the Respondent met with the baristas via Zoom to explain the plan for a partial reopening, providing them on July 10 with a copy of the Power Point presentation used to convey this information. Tr. 29-30. Exhs. E-6, E-7, E-8. Among other things, the Respondent informed them that the plan was to have only full-time employees working in small pods on the same schedule, again to limit the risk of virus transmission. Tr. 32-33. As of the July presentation, there was no timeline for opening Community Corners, Cayuga, or Gates Hall, as revealed by the question marks on the Power Point presentation slides. Tr. 39; Exh. E-6. Moreover, the Respondent made it clear at that time that it would open *either* Community Corners or Cayuga Street as part of the second phase, but not both locations. At the time, Respondent told attendees it anticipated rehiring 10 baristas, all full-time and in pods. Tr. 42-43, 47-48. The Union initially

complained about the recall plan not including any part-time positions, but it withdrew this complaint when the health and safety rationale was explained. Tr. 49.

The parties reached agreement in August of 2020, as reflected in Exh. E-4, the August 27 Memorandum of Agreement (“MOA”). The resolution of the above-referenced dispute over recall was that the Union would create two lists, a “ready to work” or “active recall” list and a “waitlist” of those who were not ready to return. After hashing out some details, the Respondent accepted those lists. Tr. 50-51. The MOA also identifies in Appendix D those who would not be returning to work with the Respondent and would not be considered for recall. Exh. E-4, top of page 3 of 5.<sup>2</sup> The MOA also specifically references the employees’ continued rights to whatever federal and state assistance was available: “Unit members will have the additional rights afforded under federal and state law, including FMLA, FFCRA, and ADA.” Exh. E-4. There is a requirement in the MOA for the Respondent to give notice to Union prior to any store reopening. Exh. E-4, p. 3, Item 4. The purpose of this was apparently to allow the Union to check with people to see about whether they wanted to return so they didn’t have to turn down a job offer, in order to preserve their right to unemployment compensation. Tr. 55.

The MOA included the active-recall list and the waitlist, as described in the MOA. These lists were not in order of seniority. “Almost everyone on the waitlist has higher bargaining-unit seniority than the last person on the active-recall list.” Tr. 52-53. The active recall list was in bargaining unit seniority order. Tr. 53. The active-recall list was exactly 14 people, which, as it turned out, corresponded precisely with the number to be recalled. Tr. 54.

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<sup>2</sup> The parties stipulated that one of the disputed voters, Britney Cunha, was on this list, and therefore did not have a reasonable expectation of recall and was not an eligible voter. Tr. at 10.

Given the fact that it was summer, and Cornell had already announced that its Fall 2020 classes would be virtual only, Respondent had no reason to believe that business in Ithaca would be robust. Tr. 35-36. Gates Hall was on the Cornell campus, and staff from that building were mostly working from home. 36-37. Thus, Trumansburg and MLK were the first locations scheduled to open with the additional safety precautions, because social media indicated that a number of customers were interested in their return. Tr. 34-35; Exh. E-6, p. 9.

The Respondent ended up opening Community Corners next because that was the location, after Trumansburg and MLK, for which social media indicated the greatest continuing demand. Respondent opted for Community Corners over Cayuga Street for two additional reasons: Unlike its other locations, Cayuga's HVAC system did not permit the addition of filters to reduce aerosol spread of the COVID-19 virus; and because it was relatively close to the MLK location, there was concern that Cayuga Street might poach customers from MLK. Tr. 37-39.

By the beginning of September 2020, it was decided that a total of 14 baristas would be rehired because the fall season requires more steaming of milk than does the summer season; but the only locations to be staffed by baristas remained Trumansburg, MLK and Community Corners. Tr. 43-44. The original plan was to rehire in two phases, but everyone ended up getting hired within the same week or two because Respondent wanted to reopen quickly and the people who wanted to return to work wanted to do so promptly. Tr. 45-46. Thirteen of the fourteen people on the active recall list were hired; one of them (Tim Brogan) indicated subsequently that he could not return until his other job finished. 55-56, 67-68, Exh. E-14.<sup>3</sup> The other thirteen were rehired.

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<sup>3</sup> Tim Brogan eventually texted to say he did not wish to return to work with the Respondent. Exh. U-10.

Two employees on the active recall list were actually rehired before the MOA was completed (Exh. E-5 and Tr. 63-64), but the rest were hired around early September; all of the rehiring was done within a 3-week period. Tr. 57-59. Another employee who had been on the waitlist informed the Respondent in early September via email that he wanted to return to work. Tr. 60-61. Exh. E-20 (Wendell Roth email). He was then rehired, and he was the last rehired. Tr. 61, 73. All of the baristas who were rehired began work by the end of September 2020. Tr. 59-60; Exh. E-10 (list of all baristas hired or rehired between January 2018 and January 2021).

According to Wendell Roth:

**Q** What caused you, if you recall, to make that decision [to move to the active-recall list]?

**A** Because I knew that State Street where I had worked, had been staffed and that they were staffing for Community Corners *and didn't have any plans for any other cafes at the time*, and I wanted to make sure that I secured a position for myself.

Tr. 117 (emphasis added).

**Q** ... [H]ow did you become aware of the fact that MLK or State Street had been fully staffed and you needed to put your name on that recall list if you were going to get in Coco or Community Corners. How did you learn of that?

**A** We had weekly Zoom meetings with Gimme! management (audio interference), and we had meetings within the Union. And then also reviewing the recall list, I was able to see who had been hired back where. And I heard in one of the Zoom meetings that they were hiring for State Street – I mean, for Community Corners.

**Q** Okay. And that's what caused you to send the email on September 7th?

**A** Yes.

Tr. 118.

**Q** Did you have any concern that if you didn't put your name on the active list at – at the time that you did, September 7th, that there wouldn't be a position open for you?

**A** Correct. Yes. I had hesitations about coming back to work at that time with the COVID situation, but I didn't want to have to, you know, lose my position or wait *indefinitely*. So I decided to go back on.

Tr. 119 (emphasis added). Mr. Roth also informed other people on the Union's negotiating committee that he intended to move his name to the active recall list. Tr. 123-124. Notably, none of the nine challenged voters testified at the hearing.

The Respondent held a meeting with whole bargaining unit on September 9, 2020. Tr. 69-70; Exh. E-9 (update prepared for and presented at the meeting); *see also* Exh. E-19. At this meeting, the employees were told that the Respondent was going to recall all baristas on the active list by September 20. Tr. 86; Exh. E-16. Exh. E-9 represented the entire complement of baristas ultimately recalled. Tr. 71.

After the end of September, two more employees moved their names from the waitlist to the active recall list. They were not rehired because there were no positions available. Tr. 73-75; Exhs. E-21 and E-22. None of the people on the waitlist had been hired back as a barista as of January 31. Tr. 78. The Respondent considered the reopening to have been completed by the end of September 2020. *Id.*; Exh. E-10.

At the end of January 2021, Respondent was concerned that Cornell would end Respondent's lease at Gates Hall if Respondent didn't open the kiosk at all, so Respondent put in an automatic espresso machine that could be managed by a single employee. This was for safety reasons because the location is so small. Tr. 40-41. That single employee ended up being a manager because Respondent had no established procedures for using the new machine or how to handle ordering via QR codes. Tr. 41. There were still no plans at this time to open Cayuga because of the same issues as before, to wit, the HVAC system and the uncertain level of demand. Tr. 42.

Other than adding door service in addition to online ordering and adding sliding windows (at a cost of \$5,000) to make this method of transaction easier, the Respondent's method of service

and delivery to its customers remained the same through January 31. Tr. 62-63. The Respondent's staffing model likewise had not changed through the end of January 2021. Tr. 63.

The Respondent's model, which follows "best precautions", has been successful at avoiding COVID-19 transmission. Tr. 80-81. Only two COVID-19 cases have been reported, both incurred outside of the Respondent's stores, and none of the Respondent's other employees became infected, nor was the virus transmitted to any customers. The New York Department of Health didn't even bother to put out any notices to indicate that there was a risk of transmission to customers or advising customers who shopped there to quarantine and get tested. Tr. 81-82.

The Respondent holds weekly meetings with the recalled baristas. The Respondent tried to have more meetings after September 9, 2020, for the whole bargaining unit, but only two people showed up to the first one, both individuals who did not desire to return to work. So the Respondent stopped holding unit-wide meetings at that point. Tr. 107-108.

**The December 28, 2020, negotiating meeting.** The entire basis for the Union's argument that the disputed voters had a "reasonable expectation of recall" is the assertion made by a few members of the negotiating committee that, at a meeting for a successor contract (not directly related to the recall), Claire Christensen told them that Respondent would be "opening Gates in February and Cayuga shortly thereafter." Christensen vociferously denies characterizing the Respondent's plans that way. According to her, when she was asked at negotiation meetings about reopening Cayuga, she repeatedly said that although Respondent loves the store, it had no plans to reopen it at that time. "We had no scheduling, no plans, nothing built, and also we were concerned about the HVAC issue in addition to the build and demand issue." Tr. 77, 78, 83; *see also* Tr. 202-203. She and Colleen Anunu both testified that she referred to the Cayuga HVAC system as a "COVID-spreading tool", and that as of December 28, 2020, the Respondent had not found a

solution to the problem. Tr. 197-198, 221. She also explained that the reason she mentioned the infrastructure problem at Cayuga was not to suggest that there would be more positions opening up once it was solved, but to explain the opposite: *i.e.*, here is the situation and it was unknown when it would change. Tr. 214.

She also told them that there were no plans to add baristas to the Gates kiosk because there was no way to do so safely. As of January 31, 2021, the Respondent had no plans to have a barista work at Gates again. Tr. 83-84, 100. In fact, she told the Union that the Respondent might not retain the lease on the Gates kiosk. Tr. 98.

Nobody from the Union denies that Christensen referenced the HVAC problem at Cayuga at the December 28 meeting or claims that the Respondent indicated it had a plan in place to solve that problem anytime prior to January 31, 2021. Tr. 157-158, 165-166, 173, 187, 192-193. The Union clearly did not regard Ms. Christensen's asserted statement as official notice that the store was reopening, as proved by the fact that it did not follow up with people on the waitlist to see if they wanted to return to work, which the MOA requires the Union to do upon receiving notice of a store reopening. Tr. 154-155. It is undisputed that through January 31, 2021, the Respondent never sent a 7-day notice email saying it was reopening another store. Tr. 162-163. What's more, the subject of a potential reopening of the Cayuga store was never raised in all of the meetings the Respondent had in January 2021 with its managers until January 27. Tr. 205-207; Exh. E-24. At a meeting on January 27, when the subject did come up, the notes of the meeting show the following entries: "Bunch of things that need to be worked through before we can open," and "Likely pushed back later than March. No solid plan yet." Exh. E-25. In short, regardless of what the Union witnesses claim to have thought Ms. Christensen said, the overwhelming evidence is

that the Respondent in fact had no plans to reopen the Cayuga store or to add any baristas to the Gates kiosk as of January 31, 2021, or for some time thereafter.<sup>4</sup>

### ARGUMENT

A. The Voters Whose Ballots Are Challenged Had No Reasonable Expectation of Recall as of January 31, 2021.

The purpose of this proceeding is to determine whether the challenged ballots of nine former employees of the Respondent – Jenna Burger, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Eva Mailloux, Samantha Mason, Jesse Sanchez and Ashley Yajko – should be counted or rejected. (The parties have stipulated that only these ballots cast in the election are challenged; Britney Cunha put her name on the “not returning” list, and therefore did not have a reasonable expectation of recall and was not an eligible voter. Tr. at 10.)

These individuals were not employed by the Respondent at the time of the election. The issue for the Hearing Officer to decide, therefore, per the guidance of the National Labor Relations Board, is whether the nine challenged voters had a “reasonable expectation of recall” at the time of the election. “Reasonableness” is an objective standard. *See, e.g., Black’s Law Dictionary*, 5<sup>th</sup> ed. (West 1979), p. 1138 (“**Reasonable.** Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. ... Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.”). *See also* <https://thelawdictionary.org/reasonable/> (“Agreeable to reason; just; proper. Ordinary or usual.”).

The only employee who testified regarding his own expectation of recall was Wendell Roth, who testified that he put himself on the active recall list in early September 2020 because he

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<sup>4</sup> The Hearing Officer elicited testimony that the Cayuga store did not in fact open until July 4, 2021. Tr. 217. This is not directly relevant, per the Hearing Officer’s ruling to that effect, but it does support the credibility of the Respondent’s representatives’ testimony that no plans were in place prior to January 31, 2021 to open the Cayuga store.

clearly understood that he might not be rehired “indefinitely” if he did not make himself available for the limited fall 2020 reopenings. Tr. 117-119. Mr. Roth’s interpretation of the situation was objectively the only reasonable one under the circumstances.

The Board’s well-established rule regarding voting eligibility and laid off employees is that where the interruption in employment is temporary, an employee is eligible to vote, but where the layoff is permanent the employee is not eligible. *NP Texas*, 370 NLRB No. 11, slip op. at 3 (2020), citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). When the question of temporary or permanent is in dispute, the Board looks to whether objective factors support a reasonable expectancy of recall in the near future. *Id.* These objective factors include the employer’s past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. *Id.*

*Remington Lodging & Hospitality, LLC*, Case 32-RC-259953, Decision & Direction of Election (Oct. 22, 2020). There are already several reported cases involving layoffs due to the COVID-19 pandemic that are instructive here.

In *NP Texas*, the casino at issue was ordered closed by the governor of Nevada due to the COVID-19 pandemic and although the employer initially sent out optimistic letters to its employees, it ultimately discharged the employees in question on May 1, offered them COBRA coverage, paid them unused vacation, and assisted them with making unemployment compensation claims. The Board reversed the Regional Director’s conclusion that the employees at issue had a reasonable expectation of recall and were therefore entitled to vote in the election:

In the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectancy of recall exists. ... Here, the Employer has not indicated, and there is no basis for finding that it could have indicated, when it will resume operations and/or recall the employees at issue. While the Employer’s managers may have made statements suggesting that the laid-off employees would be recalled in late April, they made these statements in early March. By the time the employees were laid off on May 1, it was clear that the Employer had no idea of when (or whether) the Texas Station Casino would reopen and resume operations. Nor does the

Employer have any “past practice” relating to laying off employees in the face of an unprecedented pandemic. Moreover, the Employer continues to have no set timeframe for when—if ever—Texas Station Casino will reopen. Under such circumstances, the totality of the evidence indicates that the Employer cannot reasonably predict when Texas Station Casino will reopen or whether (much less when) any of the laid-off employees will be recalled or rehired. Combined with the May 1 termination letters to employees, there is no basis for finding that any unit employees have a reasonable expectation of recall at this time.

*NP Texas*, 370 NLRB No. 11, slip op. at 3 (2020).

In *Remington Lodging*, the employees were likewise sent termination letters due to the COVID-19 pandemic, though the hotel in question did partially reopen and hire back a few employees within a month or two thereafter. However, the Regional Director concluded that with the industry still suffering from the pandemic, the likelihood of rehire for the remaining discharged employees was slim despite managers’ moderately optimistic communications with the employees, and the employer’s behavior was consistent with the permanent discharge of its employees:

Although the hotel has not ceased operation, it has greatly curtailed its normal operations due to the COVID-19 pandemic, and its future remains uncertain. Both here and in *NP Texas*, the COVID-19 pandemic resulted in a catastrophic impact on business and a layoff of all or almost all employees. Reflecting the unknown nature of the situation, in both cases managers and supervisors were optimistic and made statements regarding their hope that employees would be recalled soon. However, the pandemic has not been a short-term event, and in both this case and *NP Texas* a short-term layoff was followed by a permanent layoff in May. In both cases the employer continued to strike an optimistic tone regarding recovery, but employees were notified in writing that their employment status had ended. Further, actions taken were consistent with the usual practice when an employees’ employment ended. In *NP Texas* this included paying out vacation, requiring employees to return their uniforms, clean out their lockers, and provide COBRA information regarding employee insurance. In this case this involved cleaning out lockers, issuing final paychecks, and providing COBRA information.

*Remington*, *id.* at 6-7.

Similarly, in *Sea World of Florida, LLC*, Case 12-RC-257917 (Decision and Direction of Election, Sept. 9, 2020), <https://www.nlr.gov/case/12-RC-257917>, the closure of the employer's parks due to the pandemic led to only a few of the unit employees being recalled for work; the rest did not have a reasonable expectation of recall:

The fluctuating pandemic conditions that are beyond the Employer's control make it essentially impossible for the Employer or the employees to predict when a further recall will be possible. In addition, the remaining furloughed employees have been laid off for almost six months now. In these circumstances, absent more specific information from the Employer as to whether or when they will be recalled, it cannot be said that the remaining furloughed employees who have not been recalled have a reasonable expectancy of recall in the near future. Rather, it appears that the Employer cannot predict when it will resume full operations or be able to recall the remaining employees in view of the pandemic.

*Id.* at 19.

The Union's allegation that Claire Christensen misled members of the negotiation team into thinking the Cayuga store would be opening in the spring – which amounts to the Union's entire argument in favor of reasonable expectation of recall – does not by itself establish a reasonable expectation of recall for the employees who declined to put their names on the active-recall list in August or September 2020. As a consequence of the pandemic, the Respondent had to close all of its stores and restructure its business. Like the employers in *NP Texas* and *Remington Lodging*, it terminated all of its bargaining unit employees shortly after the pandemic began, including paying them accrued vacation and offering them COBRA coverage. Any statement by Claire Christensen indicating hopefulness that the Cayuga store would open in the spring was, at best, an optimistic statement that did not belie the fact that there were no plans in place to open the Cayuga store or rehire any more baristas as of January 2021. Most of the challenged voters' likelihood of recall was undermined even further by the fact that two of them, Josh Martinez and Brenden Lukosovich, had already added themselves to the active recall list and

would therefore have been the first ones hired in the event of attrition or another store opening. Tr. 73-74.

Cases predating the COVID-19 pandemic likewise show that the baristas had no reasonable expectation of recall after September 2020 regardless of any optimistic statements made by the Respondent. The employer in *Sol-Jack Co.*, 286 N.L.R.B. 1173 (1987), had experienced a decline in sales due to losing five of its six outside customers. An employee was informed by the company that he was being laid off “because of the company’s lack of business and poor financial condition.” *Id.* at 1173. At the time of his layoff, one of the owners of the company told the employee that “he might be back to work in 1 or 2 weeks,” although the company later told him that the layoff was permanent. *Id.* In determining that the employee did not have a reasonable expectation of recall, the NLRB focused on the deteriorating financial condition of the company and the employee’s testimony regarding his own lack of work, while employed, and found that these factors outweighed the owner’s statement indicating he might be back to work in 1 or 2 weeks (which it determined was a “vague statement” meant to “lend hope to the laid-off employee [rather] than to give a realistic assessment of his being recalled to work”). *Id.* at 1173-1174. ***“When the objective factors involved indicate a laid-off employee had no reasonable expectancy of recall, vague statements by the employer about the chance or possibility of the employee being hired will not overcome the totality of the evidence to the contrary.”*** *Id.* (emphasis added).

In *NLRB v. Ideal Macaroni Co.*, 989 F.2d 880 (6th Cir.1993), there was a declining need for employees due to a resolution of previous manufacturing problems, which caused Ideal to lay off three employees in March 1986. *Id.* at 880. Ideal told the employees to return their uniforms and clean out their lockers, and paid the employees for one week of vacation, even though the employees were not yet entitled to that vacation. According to testimony before the NLRB, one

employee, upon being told that she would get paid for vacation, told her supervisor: “That sure tells me that we aren’t coming back.” In response, her superior stated that the layoff was supposed to be temporary. In addition, that employee and another testified before the NLRB that they were told that they would be called back to work in July to help with the annual cleaning of the plant. *Id.*

The Sixth Circuit nevertheless concluded that the employees did not have a reasonable expectation of recall. *Id.* at 882. It based its decision on the company’s business reason for the layoffs, the fact that no one was hired to replace the laid off employees, and the fact that all of the employees were recent hires in a workplace that required fewer and fewer employees. *Id.* As to the employees’ testimony that their supervisors indicated they would be called back to work, the Court concluded that the statements were “certainly inconsistent with the actual employment facts, and were, at best, vague and ambiguous ....” *Id.* at 883. *See also In Re RCC Fabricators, Inc.*, No. 4-CA-31757, 2003 WL 22454433 (NLRB Div. of Judges Oct. 23, 2003) (layoff due to unexpected loss of business supported conclusion that there was no reasonable expectancy of recall, and manager’s statement that he would hire the employees back if he could find work for them did not provide a reasonable expectation of rehire); *a+b Hvac Servs., Inc.*, No. JD(NY)-44-13, 2013 WL 5305832 (NLRB Div. of Judges Sept. 19, 2013) (objective economic factors did not support likelihood of recall, and alleged statements by managers that “when things pick back up, we’ll give you a call” did not provide employees with reasonable expectancy of recall), citing *In Re MJM Studios of New York, Inc.*, 338 NLRB 980, 981 (2003) (employees had no reasonable expectancy of recall when economic factors drove their layoff and “vague statements” about the possibility of recall did not provide reasonable expectation) and *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998) (employees told that their chances for recall “depended” since “things could

change” did not have reasonable expectation of recall); *Foam Fabricators*, 273 NLRB 511, 512 (1984) (“The statement by the Employer, that it was ‘compelled to lay [Ross] off at this time,’ is nothing more than a vague implication that Ross may eventually be recalled and is insufficient to give rise to a reasonable expectation of recall in the near future.”); *Tomadur, Inc.*, 196 NLRB 706, 707 (1972) (where manager told laid-off employee to look for work elsewhere, the allegation that the employee was also told there was “no reason” why he might not come back in the future did not provide an adequate basis for concluding that he had a reasonable expectancy of reemployment).

In *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001), Seawin suffered financial consequences as a result of its inefficient evaluation of inventory and loss of key customers, which necessitated laying off seventeen production workers in January 1998. A management official used words like “hopefully” or “probably” to indicate they might be called back in two weeks to a month. Six of the seventeen laid-off employees were eventually recalled to replace employees who quit or were terminated. *Id.* at 553-554.

In applying the NLRB factors in that case, the Sixth Circuit noted that shortly after the layoff, Seawin modernized its production processes, which led to a decreased need for the type of services the laid off workers previously provided, and concluded that “[t]his change in the nature of Seawin’s business deprives the laid-off employees of a reasonable expectancy of recall.” *Id.* at 555-556. Similarly here, the change in processes adopted by the Respondent to cope with the COVID-19 pandemic are still in place and make it unlikely that most of the terminated employees, many of whom worked primarily part-time, would be recalled. In September 2020, the Respondent rehired only those employees who were willing to work full-time in employee “pods.”

The court in *Seawin* then went on to consider what the employees were told about the likelihood of recall. Noting the statements set forth above that were attributed to Seawin management, the Court concluded that “the objective circumstances surrounding the layoffs, *i.e.*, the declining sales, building inventory, eroding customer base, and increasing automation do not support a reasonable expectation of recall” and, accordingly, “equivocal statements by the vice-president of Seawin suggesting the possibility of recall do not ‘provide an adequate basis for concluding that an employee had a reasonable expectancy of recall.’” *Id.* at 558 (quoting *Sol-Jack*).

Finally, the Court looked at the future plans of the employer. In so doing, the Court considered it significant that Seawin had consistently maintained the number of employees with which it operated, since the time it laid off the plaintiffs, while at the same time improving its efficiency, thus indicating that the need for the laid off workers had not increased in the months after the layoffs. *Id.* at 558-559. In conclusion, the Court found that the plaintiffs did not have a reasonable expectation of recall.

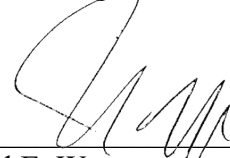
The same is true here, where the Respondent consistently communicated to its rehired baristas and to the Union from July 2020 through January 31, 2021 that it did not intend to modify its full-time barista requirement working in employee pods. This model was a proven success at preventing any COVID outbreaks amongst the employees, and management told everyone that the full-time model was there to stay. Like the employer in *Seawin*, the full-time model implemented by the Respondent in response to the COVID pandemic reduced the number of baristas necessary to staff the locations, making it highly unlikely that more than the 14 baristas on the active recall list as of September 2020 would ever be offered rehire. It was exactly for this reason that Wendell Roth took his name off the waitlist and placed himself on the active recall list on September 7,

2020, making him the last barista to be offered rehire. Notably, the Respondent’s full-time staffing model remains in place to this day. *Accord Bledsoe v. Emery Worldwide Airlines, Inc.*, 2009 WL 3127740 (S.D. Ohio Sept. 28, 2009), *aff’d*, 635 F.3d 836 (6th Cir. 2011) (using NLRB standard for “reasonable expectation of recall” in WARN case and concluding that the plaintiffs did not have a reasonable expectation of recall, primarily because the company’s certification by the Federal Aviation Administration remained in doubt and expectations continued to change).

From July 2020 through January 2021, the Respondent Gimme! Coffee accurately and consistently communicated to its rehired baristas, former baristas and the Union that it would only offer to rehire to 10-14 full-time baristas due to the substantially modified staffing model for its three open Ithaca locations. General statements by Claire Christensen regarding the future possibility of the Cayuga Street location opening were aspirational at best, and at all times qualified by a need to resolve a dangerous employee safety issue – the HVAC system – for which no solution had been found as of January 31, 2021. Based upon the Respondent’s clear and consistent communications throughout the relevant time period, the nine challenged voters (none of whom offered testimony at the hearing) had no reasonable expectation of recall, and their ballots should be rejected.

Dated: September 29, 2021

Stokes Wagner, ALC.



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*Attorney for Gimme! Coffee, Inc.*

*Gimme! Coffee v. Workers United Local 2833*  
National Labor Relations Board, Case No. 03-RD-271639

I am employed with the law firm of Stokes Wagner ALC, whose address is 903 Hanshaw Road, Ithaca NY 14850. I am over the age of eighteen years, and am not a party to this action.

On September 29, 2021, I caused to be served the following document(s) described as:

- **POST- HEARING BRIEF OF THE EMPLOYER,  
GIMME!COFFEE, INC.**

on the interested parties in this action by the means designated below:

☒ **BY ELECTRONIC FILING** – By serving the above-described document(s) by email to the parties and their counsel of record:

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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on September 29, 2021 at Ithaca, New York.



---

LYNNE INGALL  
Employee at Stokes Wagner, ALC

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 3

Gimme Coffee, Inc.,

Employer,

03-RD-271639

and

Workers United Local 2833, SEIU

Union,

and

Courtney Susan Shelton,

Petitioner

---

WORKERS UNITED'S POST-HEARING BRIEF TO HEARING OFFICER ON  
ELECTION CHALLENGES

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## INTRODUCTION

Gimme Coffee, Inc., an Ithaca-based coffee chain, challenged voters in a decertification election, asserting that employees who were laid off because of the pandemic had no “reasonable expectation of rehire, ... were not employed ..., nor did they have a reasonable expectation of being rehired....”<sup>1</sup> In fact, these employees have recall rights under an agreement they negotiated through their union, Workers United Local 2833, SEIU (hereinafter, “Workers United” or “Union”). Moreover, Gimme told employees and Union representatives on December 28, 2020, that it intended to reopen its two closed locations around February 2021. The employees reasonably expected to be able to exercise their recall rights in the near future as the population was vaccinated, the pandemic subsided, life returned to normal, and students returned to their campus. Therefore, the nine ballots at issue should be opened and counted in the election results.

## FACTS

### *Background*

After an election, on June 8, 2021<sup>7</sup> the NLRB certified Workers United as the bargaining representative of Gimme’s approximately 33 baristas and lead baristas<sup>2</sup>

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<sup>1</sup> Employer’s counsel, 1:11.

<sup>2</sup> Thirty three is the number immediately preceding the Covid layoffs. EX11. Appendix A. lists the employees in EX11 with a late March 2020 “termination date.” Inasmuch as these employees had recall rights, they were laid off, not terminated, see fn.5, below. Claire Christensen, Gimme’s comanaging head of operations (1:21), testified that there were “32 active baristas ... [a]t the time of the COVID closure.” Christensen, 1:22-23. Transcript citations are usually in the format, “witness, volume:page. Exhibits are in the format “EXnumber” for Gimme exhibits, “BXnumber” for Board exhibits, and “UXnumber” for Workers United exhibits.

at multiple locations around Ithaca, New York.<sup>3</sup> These locations included: Cayuga, Martin Luther King Jr. Street (“MLK Street”), Trumansburg (“T-Burg”), Community Corner (“COCO”) and Gates Hall (a kiosk on Cornell University’s campus).<sup>4</sup>

### ***The layoffs***

Covid 19 struck in early 2020. Gimme laid off all employees.<sup>5</sup>

### ***The MOA***

Around early April 2020, the parties started bargaining about the pandemic’s effects on working conditions. The bargaining culminated with a two-part document signed on August 28, 2020 entitled “Effects Bargaining and COVID-19 Agreement” and, later in the document “Memorandum of Agreement August 27th, 2020” (jointly, “the MOA”).<sup>6</sup>

The parties agreed that recalled employees would retain their initial hiring dates and wage rates, and established a comprehensive recall procedure. The Agreement permitted employees to decline recall offers and to be placed on a waitlist with specified rights to be recalled later. It placed no duration on recall rights. At the time the rules of the MOA were finalized, the Union communicated with all bargaining unit members, who categorized themselves into the three lists

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<sup>3</sup> 03-RC-198769.

<sup>4</sup> Christensen, 1:21-22. Although Christensen does not mention it, “T-burg” is used throughout the hearing for Trumansburg.

<sup>5</sup> Christensen, 1:23-24. Although Gimme insists that it “permanently terminated” the baristas, the baristas had recall rights under the labor contract, UX2, Article XIB. As will be discussed below, the employees continued to have recall rights under the MOA, EX4.

<sup>6</sup> EX4.

the MOA established: 1) those that wanted to return immediately; 2) those who wanted to exercise their recall rights and return some time in the future – the waitlist; and 3) those who did not expect to come back to work, and would not be returning. The Agreement named 18 employees who chose to be waitlisted. The parties stipulated, “pursuant to the MOA dated August 27, 2020, the nine employees who cast ballots that were challenged and are the remaining subject of this proceeding, possessed recall rights as defined in the MOA as of January 31st, 2021.”<sup>7</sup>

### ***Reopenings***

For the fall 2020 semester, Cornell University, which has a “huge impact” on Ithaca’s economy – and on Gimme’s economy – continued to be closed and went “all virtual.”<sup>8</sup> All Cornell staff would work from home.<sup>9</sup>

Still, Gimme reopened State Street, with 7 unit employees, down from 8; COCO, with 3 unit employees, down from 5; and T-burg, with 4 unit employees, down from 5; for a total of 14 unit employees, down from 33.<sup>10</sup> Gates Hall, located at Cornell, and Cayuga, otherwise Gimme’s site closest to Cornell, which previously employed, respectively, 8 and 7 employees, remained closed.<sup>11</sup>

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<sup>7</sup> Stipulation, 1:92.

<sup>8</sup> Christensen, 1:36.

<sup>9</sup> Christensen, 1:36-37.

<sup>10</sup> EX11, Appendix A and EX10, Appendix B. Appendix B lists the employees from EX10, with “rehire dates” around September 2020.

<sup>11</sup> EX11 and Appendix A. Christensen admitted that Cayuga’s proximity to the dormant Cornell was one of several reasons for Gimme’s decision not to reopen Cayuga, 1:39.

### *The light at the end of the tunnel*

By mid-December the future brightened. Cornell was planning to have “limited in-person learning” in the spring 2021 semester.<sup>12</sup> It anticipated another 1,500 students returning for the spring semester, even though, as a December 10 Cornell Daily Sun article was titled, “Most Courses Will Be Taught Online This Spring....”<sup>13</sup>

Moreover, it appeared that the pandemic was going to be brought under control. In December, the FDA authorized two highly effective vaccines.<sup>14</sup> By December 10, Dr. Anthony Fauci, then-director of the National Institute of Allergy and Infectious Diseases, said, “we could approach herd immunity by summer’s end and ‘normality that is close to where we were before’ by the end of 2021.”<sup>15</sup> On January 21, Business Insider published an article entitled, “Fauci says the US could see a ‘degree of normality’ by the fall if 70-85% are vaccinated by the end of summer.”<sup>16</sup>

Meanwhile, Workers United and Gimme were negotiating their second contract. During negotiations on December 28, Gimme Manager Christensen told Workers United’s committee that Gimme would be opening Gates Hall and Cayuga in mid or

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<sup>12</sup> Christensen, 1:97.

<sup>13</sup> Cornell Daily Sun, “Most Courses Will Be Taught Online This Spring. Here’s How Cornell Decided the Roster.” 12/10/2020, <https://cornellsun.com/2020/12/10/most-cornell-courses-will-be-taught-online-this-spring-heres-how-cornell-decided-the-roster/>. UX15. Workers United requests that judicial notice be taken of this and later-cited newspaper articles. See Fed.R.Evid. 201.

<sup>14</sup> New York Times, “The F.D.A. approves Moderna’s Covid vaccine, adding millions more doses to the U.S. supply.” 12/18/2020, <https://www.nytimes.com/2020/12/19/world/the-fda-approves-modernas-covid-vaccine-adding-millions-more-doses-to-the-us-supply.html>.

<sup>15</sup> “Fauci says herd immunity possible by fall, ‘normality’ by end of 2021,” <https://news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic>.

<sup>16</sup> <https://www.businessinsider.com/fauci-degree-normality-fall-70-85-vaccinated-by-end-summer-2021-1>.

late February.<sup>17</sup> While Christensen denies making this statement, she admitted saying, “we’ll be looking at rehire or reopening sometime in the spring.”<sup>18</sup> Around January 26, 2021, Gimme announced that Gates Hall would reopen on February 8, but staffed by non-unit managers.<sup>19</sup>

### ***The election***

The election agreement provided for a January 31, 2021 eligibility cutoff and mail ballots returnable by close of business March 16, 2021.<sup>20</sup> The tally on March 17 was four votes for union representation, seven opposed, with ten determinative challenges: Jenna Burger, Brittany Cunha, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosavich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko.<sup>21</sup> All but Cunha were on the MOA’s waitlist.<sup>22</sup> Workers United and Gimme agreed that Cunha was ineligible.<sup>23</sup> This leaves nine ballots at issue, all of them belonging to workers who were on the waitlist during the relevant time period.

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<sup>17</sup> Lapinski, 1:143-146 (“to open Gates in February and Cayuga shortly after”), corroborated by notes, UX4 (“opening Gates early February, opening Cayuga shortly after”); Baird, 1:168-169 (“the Gates location on Cornell’s campus, would be opening in February. And that the Cayuga Street location would be ... opening shortly after.”); Bensinger, 2:179-185 (“they’re going to open Gates in early February, and shortly -- very shortly after that, they would be opening in Cayuga”); Bonadonna, 2:187-189 (“they were planning -- they were tentatively opening Gates and Cayuga in February”), corroborated by notes UX5 (“Gates & Cayuga tentatively opening in mid or late February”).

<sup>18</sup> Christensen, 2:204.

<sup>19</sup> UX11.

<sup>20</sup> BX2.

<sup>21</sup> BX3, BX1(a).

<sup>22</sup> EX4, Appendix C.

<sup>23</sup> Stipulation, 1:10.

## ARGUMENT & ANALYSIS

### I. Introduction to the argument

The challenged employees could reasonably expect recall in the near future. The MOA provides for indefinite recall rights.<sup>24</sup> Christensen told them that Gimme would be opening Gates Hall in February and Cayuga shortly thereafter. Although Gimme reopened Gates Hall with managers, the employees could reasonably expect that the Gates Hall employee complement would expand as Cornell students returned to campus; and they could reasonably view Gates Hall's reopening as foreshadowing Cayuga's reopening in further compliance with Gimme's December 28 promise.

More generally, during the election period, the employees reasonably could expect the opportunity to exercise their recall rights in the near future as the pandemic would end, life would return to normal, Cornell students would return to their campus, and Gimme would expand employment to meet the expanded demand. Even partial expansion from the then current active employee contingent of 14 employees towards the pre-Covid 33 person workforce would provide more than enough employment opportunities for the nine challenged employees.

Gimme maintains that there was no reasonable expectation of recall because Christensen denies telling Workers United's committee that Gates Hall and Cayuga would be reopening. On this point, the four union representatives, corroborated by

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<sup>24</sup> EX4, Stipulation, 1:92.

two sets of bargaining notes are more credible than Christensen. And even Christensen spoke of hiring in spring 2021.

Gimme is also expected to rely on *Texas Station Gambling Hall and Hotel*<sup>25</sup> and later Regional Director decisions following *Texas Station*. These cases are distinguishable, because (1) the employees in those cases had not negotiated indefinite recall rights, (2) the employers had not informed the employees with a similar degree of definiteness of their intent to reopen, and (3) when the union filed their petitions pre-vaccine, there was no end to the pandemic in sight.

**II. Employees could reasonably expect that, as the pandemic foreseeably subsided, Gimme would reopen its closed sites and would expand its employee complement.**

In mail ballot elections, individuals are eligible voters if they are eligible “on both the payroll eligibility cutoff date and on the date they mail in their ballots....” *Dredge Operators*.<sup>26</sup> To be eligible to vote, a laid-off employee must have a reasonable expectation of recall in the near future on the eligibility dates. *Pavilion at Crossing Pointe*.<sup>27</sup> And, “In determining whether employees have a reasonable expectation of recall, the Board examines several factors, including what the employees were told about the likelihood of recall, the circumstances surrounding the layoff, and the employer’s past experience and future plans.” *Id.* Moreover, a “laid-off employee need only have a reasonable expectancy, not a definite date, of

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<sup>25</sup> 370 NLRB No. 11 (2020).

<sup>26</sup> 306 NLRB 924, 924 (1992).

<sup>27</sup> 344 NLRB 582, 583 (2005)

recall.” *Pavilion at Crossing Pointe*,<sup>28</sup> citing *Atlas Metal Spinning Co.*<sup>29</sup> Finally, a challenger must rebut the presumption that layoffs are temporary. *Laneco Construction Systems*.<sup>30</sup> An employer’s mere assertion of ineligibility is insufficient. See *Intercontinental Mfg. Co.* (rejecting an employer’s unsupported assertion that “employees were ineligible to vote in the election because they were permanently laid off prior to the eligibility date herein and merely rehired as new employees after that date but prior to the election.”).<sup>31</sup>

The eligibility dates here are the January 31 payroll date and those shortly preceding the March 16, 2021 ballot-return date. Before and through these dates, the challenged employees had a reasonable expectation of recall. Their union had renegotiated recall rights into the MOA. And in September 2020 Gimme committed itself to continue its business by reopening three of its five sites and recalling 14 of 33 employees.

By mid-December the pandemic looked like it was going to wind down as the population got vaccinated. On December 28, Christensen spoke of opening Gates Hall and Cayuga in February 2021. Gimme announced definitively the Gates Hall reopening shortly before the January 31 eligibility date, suggesting that Gimme would shortly act on its intent to reopen Cayuga. And throughout the pre-election period, the Cayuga site remained available for reopening.

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<sup>28</sup> 344 NLRB at 583.

<sup>29</sup> 266 NLRB 180, 180 (1983).

<sup>30</sup> 339 NLRB 1048, 1048-1049 (2003).

<sup>31</sup> 192 NLRB 590, 590 fn. 4 (1971).

Evidence emerging after January 31 cannot establish – or refute – a pre-election reasonable expectation of recall. So in *Osram Sylvania*, employees lacking any recall expectation on the payroll date were ineligible despite pre-election recall.<sup>32</sup> Therefore, an additional Covid wave caused by a combination of people’s reluctance to be vaccinated and the ultra-contagious (to unvaccinated individuals) delta variant cannot be considered. Nor can Gimme’s July 4, 2021 reopening of Cayuga,<sup>33</sup> nor Cornell’s full reopening for the fall 2021 semester<sup>34</sup> be considered.

What matters is the expectation of recall as it existed during the election period. During that time, the nine employees in question had a reasonable expectation of recall. *Osram* is distinguishable because there, “while the Employer's business did in fact improve after April 28 [the payroll eligibility date], the Employer has not shown that it predicted, or, indeed, that it could have predicted, this improvement prior to April 28.”<sup>35</sup> Here, Gimme could have predicted, and in fact did predict, before January 31, 2021, that it would be reopening Cayuga and adding non-supervisory staff to Gates in the spring, and certainly no later than fall 2021.

Furthermore, the apparent turnover at Gimme’s stores demonstrates that the nine employees at issue had a reasonable expectation that there would be an opportunity for them to return to work. Employer Exhibits 10 and 11 demonstrate in general terms the turnover at all of Gimme’s stores, including the five that are

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<sup>32</sup> 325 NLRB 758 (1998).

<sup>33</sup> Christensen, 2:217.

<sup>34</sup> Cornell Daily Sun, “Cornell to Fully Reopen for Fall 2021” June 28, 2021, <https://cornellsun.com/2021/06/28/cornell-to-fully-reopen-for-fall-2021/>.

<sup>35</sup> 325 NLRB at 760, fn.10.

covered by the parties' CBA. Employer Exhibit 10 shows that at the five stores, eighty-nine (89) employees were hired just in the period of January 2018 through the time Covid began to affect the stores.<sup>36</sup> In that same period, eighty (80) employees appear to have left their employment.<sup>37</sup> In other words, the 20 FTEs that Christensen testified existed among the five stores could have been filled, terminated, and refilled four times over in just that period of fifteen months. The turnover at the stores was clearly significant.

Given this, the Employer cannot rely on arguments regarding the scarcity of openings at the stores during the relevant time period. Given the rate of turnover that actually existed at the stores, and given the employment turmoil that Covid has created in general, it stands to reason that every one of the nine employees at issue could have easily been recalled in a matter of weeks, let alone at any time in period of the Covid reopening. Also because of this, the Employer's change to prefer full-time employment cannot be a basis for finding the challenged employees had no expectation of recall.

### **III. Gimme's witnesses are unreliable.**

Four union witnesses testified that at a December 28, 2020 bargaining session for a successor CBA, Christensen said that Gimme would be reopening Gates Hall in early February 2021, and reopening Cayuga shortly thereafter. Their testimony was corroborated by two separate sets of bargaining notes that were taken during

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<sup>36</sup> EX10.

<sup>37</sup> EX11.

the bargaining session. Christensen, supported only by her co-manager Colleen Anunu, denied making the statement. Christensen is not credible. And Anunu, backing up Christensen's incredible story, is also not credible.

Christensen claimed that she told Workers United's committee that:

“[W]e were hiring a Gates' store manager, which was a position that was open at that time.

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And I also said that we were hoping to reopen Cayuga Street, but that there was a problem with the HVAC system, which we had not solved and I didn't have a solution for.<sup>38</sup>

Manager Colleen Anunu attempted to corroborate:

We're rehiring a Gates Hall manager for likely February, and hopefully, Cayuga Street in the future. But there's an HVAC issue, which Claire often described, too -- including that meeting -- as “a COVID-spreading tool,” and said we had no infrastructure solution for it.<sup>39</sup>

Union representatives remembered Christensen's allusion to a problem with the HVAC system. But there is no Union testimony corroborating Christensen's use of florid terms like “Covid-spreading tool” or “Covid-super spreader,” or even “Covid-spreader,”<sup>40</sup> corroboration which Union committee members would likely have granted had Christensen in fact used these phrases. Moreover, and more significantly, the committee members recollected no representation that the problem was insurmountable.<sup>41</sup>

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<sup>38</sup> Christensen, 2:197-198.

<sup>39</sup> Anunu, 2:221.

<sup>40</sup> Bensinger, 2:181, 183; Bonadonna, 2:192.

<sup>41</sup> Lapinski, 1:163-166; Baird, 1:168-171; Bensinger, 2:182; Bonadonna, 2:187, 191.

Despite the above representations, Gimme introduced evidence that corroborates the employees' reasonable expectation of recall in the near future, while also supporting the accuracy of the union witnesses' testimony. Most significantly, Christensen testified regarding the December 28 meeting that, "I said, and hopefully, we'll be looking at rehire or reopening sometime in the spring."<sup>42</sup> She qualified this statement, "But it's definitely not happening now, and we don't have those open positions."<sup>43</sup> For the employees to be eligible voters, they do not have to be rehired "now" or even have definite recall dates – a reasonable expectation of recall in the near future is good enough and spring is in the near-enough future.<sup>44</sup>

Gimme also introduced into evidence a document entitled "Upstate Store Manager Meeting Agenda 01/27."<sup>45</sup> Regarding the Cayuga reopening, it states, "Likely pushed back later than march. No solid plan yet." Based on this, it is clear Gimme was considering reopening Cayuga in March or before, and pushed it back – Christensen suggests for two months more (the springtime) – when "we [would] have a better COVID situation,"<sup>46</sup> i.e. when more people got vaccinated and felt sufficiently safe to reestablish their pre-pandemic habits of going to coffee shops. As

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<sup>42</sup> Christensen, 2:204.

<sup>43</sup> Christensen, 2:204.

<sup>44</sup> *Pavilion at Crossing Pointe*, 344 NLRB at 533 (A "laid-off employee need only have a reasonable expectancy, not a definite date, of recall."), citing *Atlas Metal Spinning Co.*, 266 NLRB at 180.

<sup>45</sup> EX25.

<sup>46</sup> Christensen, 2:209-210.

the document also stated, regarding the Cayuga reopening, “anticipate sales picking up in warmer weather.”

Regarding Gimme’s labor needs at even the reopened locations, Christensen claimed that “I had no projection that COVID was -- was going to get better.”<sup>47</sup> However, the reality is that because of the vaccination roll-out during the election period, it could reasonably be projected that Covid was going to get better in the near-enough future to impart eligibility on the laid-off employees. In light of the vaccines, Christensen’s statement further undermined her credibility.

Christensen further lost credibility by exaggerating the obstacles to Cayuga’s reopening. At first, she emphasized both the HVAC problem along with Cayuga’s serving the same customer base as MLK and the loss of customers resulting from Cornell’s closure.<sup>48</sup>

But we repeatedly said there's an issue with demand and there's an issue with HVAC. We haven't solved either of those problems.<sup>49</sup>

But as argued above, Gimme anticipated the demand problem waning – it “anticipate[ed] sales picking up in warmer weather.”<sup>50</sup> And in discussing Cayuga’s reopening during the December 28 negotiations session, Christensen only mentioned the HVAC issue.<sup>51</sup> There was no longer a demand problem, at least none worth mentioning.

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<sup>47</sup> Christensen, 1:100

<sup>48</sup> 1:38-39, 42.

<sup>49</sup> 1:42.

<sup>50</sup> UX 25.

<sup>51</sup> Christensen, 2:197-198.

Regarding the supposed insolubility of the HVAC problem, there is a surprising lack of documentation. Christensen does not mention it in her notes of the December 28 bargaining session.<sup>52</sup> While Workers United concedes that she mentioned the HVAC problem, she did not say it was an insurmountable obstacle. And Christensen's failure to document the issue as it was discussed on December 28 suggests that it was not as grave as she insists.

Also reflective of the HVAC issue's lack of gravity is the January 27 meeting agenda. According to Christensen, the HVAC problem was incorporated into the general, "Bunch of things that need to be worked through before we can open."<sup>53</sup> Meanwhile the "workflow problem" merited its own separate bullet point.

Similarly inexplicable is the non-existence of documentation of the HVAC problem generated by the numerous conversations between Christensen and the various people she consulted about the problem. Christensen named Thom Cooper, Tomas Reyer, Claudia Brenner, Kevin Cuddeback, and Ben Guthrie.<sup>54</sup> Gimme submitted not even a single email generated by these conversations. Christensen admitted that she obtained no estimate for the work.<sup>55</sup>

Even beyond all this, it would have strained credulity for a person in late 2020 or early 2021 to view the need for work on an HVAC system to be something that would take months or longer to address. Many thousands of businesses have changes or improvements made to HVAC systems made every month, including

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<sup>52</sup> EX23.

<sup>53</sup> UX25; Christensen, 2:209.

<sup>54</sup> Christensen, 2:198-201.

<sup>55</sup> Christensen, 2:201.

during the pandemic. Even if there were evidence to support Ms. Christensen's supposed grave concern over an HVAC system – and there clearly is not – it simply would not have been a credible obstacle.

Christensen also misrepresented that she mentioned at the December 28 negotiating session, that Gimme would be staffing Gates Hall with a manager.<sup>56</sup> Union witnesses testified in great detail about Christensen's statement concerning Gates Hall, and none cited any statement that Gates Hall would be staffed by a manager. Certainly, Gimme later announced Gates Hall's managerial staffing.<sup>57</sup> But a reasonable expectation flowing from this fact is that, as business picked up, Gates Hall would later be expanded to include bargaining unit staff. Moreover, Gimme had fulfilled half of its December 28 promise – that it would reopen Gates Hall – and would therefore be more likely to fulfill the other half of its promise, that it would reopen Cayuga shortly thereafter.

Christensen was not a credible witness. Her testimony and Anunu's testimony should be discounted.

#### **IV. *Texas Station* and its progeny are distinguishable**

In *Texas Station Gambling Hall and Hotel*,<sup>58</sup> the Board ruled that an election should not be held in a hotel that closed because of the pandemic. *Texas Station* is distinguishable because the unit employees, all of whom were laid off at the pandemic's onset, had no idea when – or even whether – they would return to work.

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<sup>56</sup> Christensen, 2:197.

<sup>57</sup> UX11.

<sup>58</sup> 370 NLRB No. 11 (2020).

Most significantly, in *Texas Station*, there was no timeframe within which the workplace would reopen. Furthermore, the employees in *Texas Station* did not have a CBA or any other agreement guaranteeing them indefinite recall rights, as the Gimme workers have had in their CBA and, since August 2020, in the MOA.

Because of the uncertainty regarding the casino industry's rebound, the *Texas Station* employer decided to open several of its Las Vegas properties and see how they would perform, before opening Texas Station. The employer's CFO testified, "we will look at reopening these [other] properties [including Texas Station] once we have had a chance to fully assess how our first-to-open properties are performing post-crisis, as well as the recovery of the Las Vegas market and the economy as a whole."<sup>59</sup> By the hearing date, the employer had reopened no second-tier properties.<sup>60</sup> Another employer representative testified, "[i]t is also possible that one or more of those properties [e.g., Texas Station] will never reopen."<sup>61</sup>

In contrast, there is no question Gimme was moving towards reopening during the relevant period. In September, Gimme recalled employees to MLK Street, T-Burg and COCO. Before the election proceedings, Gimme said it would reopen both Gates Hall and Cayuga – at which sites it had previously employed 15 unit employees – in February, and then definitively announced the Gates Hall reopening.

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<sup>59</sup> Slip op. at 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Also in *Texas Station*, the petitioning union filed its petition on May 28, 2020. At this time, the pandemic was raging, the governor had ordered the casinos closed on March 18, and did not permit reopening until June 4.<sup>62</sup> But the pandemic would continue to adversely affect the casino industry, there were no vaccines and nobody could say when the pandemic would end. By early 2021, before the Gimme election proceedings, people were getting vaccinated, Cornell could be expected to continue its reopening, and the pandemic was expected to be under control within a few months.

Whether the employer would reopen Texas Station depended in part on “how Las Vegas ...was doing,”<sup>63</sup> which depended in a significant part on whether people would risk going to an airport, flying on an airplane, and then spending time in an enclosed hall – a casino – with many other people. The alternatives – deferring discretionary leisure travel and substituting the ubiquitous Zoom meetings for in-person meetings and conventions – were, under the circumstances, attractive, and people could continue partaking of these alternatives (especially business people) even after the overall recovery.<sup>64</sup>

Ithaca’s economy is dependent substantially on Cornell, which was already partially open in its second post-closure semester and would likely fully reopen in September 2021. Gimme’s business depends on the presence and mobility of

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<sup>62</sup> Slip op. at 1-2.

<sup>63</sup> Slip op. at 2.

<sup>64</sup> Bloomberg Wealth, “Business Trips Struggle to Recover in the Age of Zoom Video Meetings,” 3/2/2021, <https://www.bloomberg.com/news/articles/2021-03-02/not-so-frequent-flyers-business-travel-misses-out-on-recovery>

Ithaca's population, heavily students and those whose jobs depend on them, their taste for coffee, and their desire to sit around and enjoy the atmosphere of a coffee shop, tastes that are likely to be indulged post-pandemic.

Finally, the employees in *Texas Station* did not have the benefit of any contractual protection regarding recall rights. In that case, the employees were simply subject to management's decisions, including management's decision in May to make their layoff permanent. Nothing tempered or qualified the permanent nature of the layoff, and therefore employees' expectation of being recalled turned solely on management's discretion.

The same is not true for Gimme workers. Employees bargained for the clear and unqualified right to be recalled from layoff indefinitely in their CBA, and then again in the MOA. In the latter negotiations, Gimme workers and management directly addressed the question of what workers who had been laid off because of Covid should expect going into the future. The answer was clear: employees who put themselves on the waitlist were guaranteed the right to be recalled in subsequent phases of stores reopening. It is difficult to imagine a more explicit and deliberate statement of employees' expectation of recall.

*Courtyard by Marriot Oakland Airport*<sup>65</sup> has similar facts and is distinguishable for similar reasons. There the employer was heavily dependent on business travel –

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<sup>65</sup> 32-RC-259953 (Regional Director's DD of E, 10/22/2020)

“the hotel caters primarily to business travel associated with the airport”<sup>66</sup> – which could be permanently damaged.<sup>67</sup>

The union in *Courtyard* attempted to distinguish *Texas Station* in two respects. First, it provided data forecasting the employer’s future business recovery.<sup>68</sup> The Regional Director relied on the Board’s statement that, “in the absence of a past practice regarding layoffs, as here, where an employee is given ‘no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled,’ no reasonable expectancy of reemployment in the near future exists.”<sup>69</sup> As argued above, spring 2021 is a likely “estimate as to the duration of the layoff” and a “specific indication as to when ... the employee(s) will be recalled.”

Second, the *Courtyard* union attempted to distinguish *Texas Station* by relying on the existence of local ordinances that established recall rights.<sup>70</sup> The Regional Director held that “this inference runs afoul of the problem identified in the previous section, it presumes a continued recovery and continually increasing occupancy.”<sup>71</sup> As argued above, by January 31, 2021 a continued recovery reasonably should be presumed because of the vaccines, Cornell’s reopening, and Gimme’s increasing business.

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<sup>66</sup> Slip op. at 2.

<sup>67</sup> See fn.64, above.

<sup>68</sup> Slip op. at 5 and 8.

<sup>69</sup> Slip op. at 8, citing *Texas Station*, slip op. at 2.

<sup>70</sup> Slip op. at 5-6 and 8-9.

<sup>71</sup> Slip op. at 9.

The *Courtyard* Regional Director also found that “even assuming the ordinances operate in the manner Petitioner argues, there is no indication in the Board’s case law that an inference of this type, as compared to the actual words or actions of the employer, can fulfill this part of the Board’s test.”<sup>72</sup> Here, the challenged employees can rely on Gimme’s words and actions, including the words and actions regarding the reopening of Gates Hall and Cayuga and the words in the CBA and the MOA, to which Gimme agreed, that guaranteed the employees’ recall rights.

When combined with Gimme’s statements and actions regarding store openings and the general trend of businesses reopening described above, Gimme employees had a well-founded and unshakable expectation that they would be recalled to work in the relevant period. As such, *Texas Station*, *Courtyard by Marriot Oakland Airport* and similar authority are distinguishable to the point of irrelevance.

## CONCLUSION

No later than January 31, 2021, the challenged employees could reasonably expect that, as Ithacans got vaccinated, Covid came under control, life returned to normal and students more frequently walked around town and campus seeking coffee, Gimme would reopen Cayuga, would staff Gates Hall with unit employees, and would expand its workforce at its earlier opened locations. All reliable indicators, even as perceived on January 31, show that the process of reopening and increasing staffing would likely be accomplished around spring 2021, and certainly no later than the fall semester, 2021. Leading up to and through that point, the

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<sup>72</sup> Slip op. at 9.

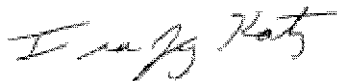
challenged employees have recall rights to the newly available positions. They therefore have a reasonable expectation of recall and a right to participate in a vote to determine whether they and their co-workers will continue to have union representation. Therefore, the challenges to the eligibility of Jenna Burger, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosavich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko should be overruled and their votes counted.

Respectfully submitted,



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917-208-0659

Dated: September 29, 2021

APPENDIX A  
EMPLOYEES LAID OFF FOR COVID  
(based on data from EX10)

NAME	SITE
Burger, Jenna	Cayuga
Cook, Curt	Cayuga
Eginton, Rachel	Cayuga
Lespier, Rebecca	Cayuga
Long, Jeneva	Cayuga
Lukosavich, Brenden	Cayuga
Mason, Samantha	Cayuga
Goodenough, Aaron	CoCo
Holzer, Rebecca	CoCo
Kaplan-Wright, Aiden	CoCo
Kassam, Tahera	CoCo
Sharp, Adonaijah	CoCo
Aldrich, Kari	Gates
Barid, Jaime	Gates
Bassett, Julianna	Gates
Feberwee, Bart	Gates
Mailloux, Ava	Gates
Sanchez, Jesse	Gates
Stewart, Taneal	Gates
Yajko, Ashley	Gates
Brogan, Timothy	State
Byrne, James	State
Dellett, Sarah	State
Johnsen, Aubrie	State
Lapinski, Maggie	State
Martinez, Joshua	State
Migdon, Paige	State
Roth, Matthew	State
Carbaugh, Amanda	Tburg
Cunha, Brittany	Tburg
Kearns, Gregg	Tburg
Schildkraut, Melis	Tburg
Shelton, Courtney Susie	Tburg

APPENDIX B  
EMPLOYEES RECALLED AT REOPENING

NAME	SITE
Holzer, Rebecca	Coco
Kassam, Tahera	Coco
Roth, Mathew	Coco
Byrne, James	State
Cook, Charles	State
Dellett, Sarah	State
Goodenough, Aaron	State
Lapinski, Margaret	State
Long, Jeneva	State
Sharp, Adonaijah	State
Baird, Molly	T-burg
Kaplan-Wright, Aidan	T-burg
Kearns, Gregg	T-burg
Shelton, Courtney Susie	T-burg

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 3

Gimme Coffee, Inc.,

Charged Party/Employer,

and

Workers United Local 2833, SEIU

Charging Party/Union.

and

Courtney Susan Shelton,

Petitioner

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**CERTIFICATE OF SERVICE**

I certify that this day I served the Union's post-hearing brief by electronic mail,  
and that the brief was E-filed through the NLRB's e-filing system.

Paul E. Wagner, Esq., pwagner@stokeswagner.com

Acting Regional Director Linda Leslie: linda.leslie@nlrb.gov

Hearing Officer Neale Sutcliff: neale.sutcliffe@nlrb.gov

/s/ Lynn Chilelli

Dated: September 29, 2021

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

**GIMME COFFEE, INC.**

**Employer**

**and**

**Case 03-RD-271639**

**COURTNEY SUSAN SHELTON**

**Petitioner**

**and**

**WORKERS UNITED LOCAL 2833**

**Union**

**HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS**

Beginning on February 23, 2021, Region 3 conducted an election among certain employees of the Employer by mail. However, the parties disagreed about whether certain individuals are eligible voters, and their ballots were challenged at the count. The subsequent count of the ballots revealed that the challenged ballots are sufficient to affect the results of the election.

The determinative challenged ballots, the party challenging eligibility and the reasons for the challenge are as follows:

<b>NAME</b>	<b>CHALLENGED BY</b>	<b>REASON</b>
Jenna Burger	Employer	Not employed/no reasonable expectation of recall
Brittany Culna	Employer	Not employed/no reasonable expectation of recall
Rachel Eginton	Employer	Not employed/no reasonable expectation of recall
Bart Feberwee	Employer	Not employed/no reasonable expectation of recall
Rebecca Lespier	Employer	Not employed/no reasonable expectation of recall
Brenden Lukosovich	Employer	Not employed/no reasonable expectation of recall
Ava Mailloux	Employer	Not employed/no reasonable expectation of recall

NAME	CHALLENGED BY	REASON
Samantha Mason	Employer	Not employed/no reasonable expectation of recall
Jesse Sanchez	Employer	Not employed/no reasonable expectation of recall
Ashley Yajko	Employer	Not employed/no reasonable expectation of recall

After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, I conclude that Jenna Burger, Brittany Cuhna, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko are not eligible to vote because they did not have a reasonable expectation of recall. Therefore, I recommend that the Employer's challenge to all ten employees' eligibility be sustained and their ballots not be opened and counted.

#### **PROCEDURAL HISTORY**

The Petitioner filed the petition on January 22, 2021. On February 10, 2021, the Regional Director approved a stipulated election agreement. Per this election agreement, an election was conducted by mail among employees in the following bargaining unit who were employed during the payroll period ending January 31, 2021:

All full-time, part-time, and variable hour employees with the job title "Barista" including Lead Baristas, employed by Gimme! Coffee at its facilities in Ithaca and Trumansburg, excluding store managers, confidential employees, professional employees, and supervisors as defined in the National Labor Relations Act, and all other non-barista employees.

The ballots were counted, and a tally of ballots was provided to the parties. The tally of ballots shows that four (4) ballots were cast for the Union and that seven (7) ballots were cast against representation. There are ten (10) challenged ballots, a sufficient number to affect the outcome of the election. No objections to the election were filed.

On August 6, 2021, the Acting Regional Director ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the challenged ballots. As the hearing officer designated to conduct the hearing and to recommend to the Acting Regional Director whether to overrule or sustain the challenged ballots, I heard testimony and received into evidence relevant documents during a hearing conducted by videoconference on September 2 and 3, 2021.

The Employer and Union each filed a brief on September 29, 2021, and I have considered those submissions.<sup>1</sup>

### **THE EMPLOYER’S AND UNION’S POSITIONS**

The parties agree that Brittany Cuhna is not an eligible voter because she did not have a reasonable expectation of recall, and that the challenge to her ballot should be sustained. The Employer argues that the nine remaining disputed individuals, all of whom were laid off as of the payroll period ending January 31, 2021, and the date of the election, did not have a reasonable expectation of recall because there were no immediate plans to open locations where these employees could be recalled. The Employer avers the challenges to all ballots should be sustained. Conversely, the Union posits that because these nine employees enjoyed collectively bargained recall rights of an undetermined duration, these rights created an expectation of recall. The Union also maintains that the Employer further established an expectation of recall for these voters through a statement that two additional locations would reopen proximate to the election. The Union argues that the challenges to the nine unresolved ballots should be overruled and the ballots should be opened and counted.<sup>2</sup>

### **THE BURDEN OF PROOF**

The burden of proof rests on the party seeking to exclude a challenged individual from voting. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007), citing *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). The test for whether laid off employees are eligible to vote in the election is “whether there exists a reasonable expectancy of employment in the near future.” *Pavilion at Crossing Pointe*, 344 NLRB 582 (2005); *Madison Industries*, 311 NLRB 865 (1993) and *Higgins, Inc.*, 111 NLRB 797 (1955). Thus, it is the Employer’s burden to show that the laid-off employees herein had no “reasonable expectation of recall in the foreseeable future.” See, *Laneco Construction Systems, Inc.* 339 NLRB 1048, 1049 (2003) citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991).

### **CREDIBILITY**

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of

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<sup>1</sup> The Petitioner, Courtney Susan Shelton, neither appeared at the hearing nor filed a brief. As such, any reference to “the parties” should be taken to mean the Employer and the Union.

<sup>2</sup> Because the circumstances of all nine challenged ballots are identical, I will analyze them together.

the record evidence is a composite of the testimony of all witnesses, in particular of testimony by witnesses that is uncontested or consistent with one another, documentary evidence, or undisputed evidence. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of my discussion of the challenged ballots related to the witnesses' testimony.

Three witnesses testified for the Employer during the hearing: Co-managing Directors Claire Christensen and Colleen Anunu, and employee Matthew Roth. Four witnesses testified for the Union: Workers United Senior Advisor Richard Bensinger, Workers United Manager Gary Bonadonna, and employees Maggie Lapinski and Jaime Baird. Overall, each witness appeared to me to be earnest in their attempts to truthfully answer questions asked on direct and cross examination. In the limited instance where a testimonial difference exists, I have given more weight to certain testimony, and I explain my reason for doing so below.

## **FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS**

### **FINDINGS OF FACT**

#### **The Employer's Operations**

The Employer operates retail establishments, also referred to as cafés, that serve coffee, food, and other beverages. The Employer maintains its principal offices in Ithaca, New York, and as relevant here, has four cafés in Ithaca, and one café in Trumansburg, New York.<sup>3</sup> Collectively, these five locations will be referred to as the unit. Two of the four cafés are located in downtown Ithaca less than three-quarters of a mile apart from each other and are referred to as Cayuga and Martin Luther King Jr. Street (MLK). The remaining Ithaca locations are either close to Cornell University or on the university's campus: One café is in a location called Community Corner (Coco) and the other establishment is located in a Cornell building, Gates Hall (Gates). The Trumansburg café is located about 25 minutes outside of Ithaca. All cafés, with the exception of Gates are dine in; Gates is a small kiosk with seating in and around the lobby.

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<sup>3</sup> The Employer previously maintained two cafés in New York City. Those facilities are not at issue in this proceeding and have since been permanently closed. The Employer also has a grocery bakery facility that is not at issue in this proceeding.

The Employer and the Union negotiated a collective bargaining agreement effective from December 28, 2017 to December 28, 2020. The record is silent regarding whether the Employer has laid off any employees at any time prior to March 2020.

Café Statuses PRE-COVID-19 through July

Much like the rest of the country, the COVID-19 pandemic struck the Ithaca area in March 2020.<sup>4</sup> At that time, the Employer employed approximately 32 unit baristas. The majority of the unit employees worked part-time.<sup>5</sup> By March 26, the Employer concluded that it was not feasible to keep their retail stores open and closed all its stores. The Employer terminated unit baristas via a form letter dated March 30.<sup>6</sup>

In early April, the Employer piloted a delivery and online-order-only program. The Employer reconfigured the space of the MLK café and purchased new equipment to provide social distancing among staff and customers. The Employer employed a staffing model in which two separate teams, called pods, worked together.<sup>7</sup>

The July 7 Meeting

Finding success with the MLK pilot program, the Employer concluded that it would more fully staff the MLK café and explore a limited reopening of two additional stores with unit baristas. Christensen and Anunu conducted an operations update meeting via ZOOM on July 7 that unit employees attended. Employer representatives conveyed the COVID safety precautions at the locations and explained a tentative, two-phase schedule for reopening two additional cafés. Trumansburg was identified as one of the cafés slated for reopening. The Employer told attendees that one of two cafés would be the second site to be reopened: CoCo or Cayuga.<sup>8</sup> Employer representatives discussed how many baristas were expected to be recalled at each reopened location.

Employer representatives further announced at the July 7 meeting that it was changing its staffing model to entirely full-time employment to ensure that staff were exposed to the fewest

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<sup>4</sup> All subsequent dates are in 2020 unless otherwise indicated.

<sup>5</sup> The parties define “part-time” employees as those working less than 30 hours a week; full-time employees are those who work 30 or more hours per week.

<sup>6</sup> The Employer does not contend that the employees’ employment relationship was completely severed as a result. Instead, the record reflects that these letters were akin to layoff notices rather than permanent termination letters.

<sup>7</sup> The Employer did not staff MLK with unit employees at this time. The record is unclear as to who staffed the café.

<sup>8</sup> The Employer explained that only one of these two locations would be reopening, and that there were no further plans to reopen the location that was not selected.

people possible. The Employer's plan was to schedule everyone in a pod for the same full-time schedule with the same coworkers. Employer representatives advised that there would be pods of two baristas at Trumansburg and at either Cayuga or Coco. At MLK, there would be a pod of three baristas with a fourth barista serving as a delivery driver. Employer representatives advised that they would be rehiring ten (10) baristas for the phased reopening of the three stores.

#### The COVID MOA and September Hiring

Cayuga was the Employer's oldest café and original location. Throughout the pandemic, Christensen and Anunu repeatedly stated to employees that they really like the Cayuga location, including the space and the store itself. The record reflects that these positive feelings were shared by unit employees as well. Ultimately, the Employer decided to open CoCo rather than Cayuga, reasoning that Cayuga's proximity to MLK could lead to a loss of sales at MLK. The Employer also asserted that Cayuga's HVAC system did not possess a filtration system.<sup>9</sup> Christensen testified that she was concerned that a lack of a filtration system would endanger staff and customers. The Employer decided to reopen Trumansburg because of robust social media requests to do so. As of the summer, there was no plan to open Gates because Cornell had advised that classes would be held virtually with no in-person learning.<sup>10</sup> There was also a question as to whether Cornell would allow the Employer to retain its lease at Gates.

Between July and August, the parties engaged in bargaining over the effect of the pandemic on unit employees. The agreement reached by the parties, called "the COVID MOA," was intended to amend the collective bargaining agreement with respect to layoff and recall during the pandemic. Regarding recall, the agreement provides, in part, that the Employer advise the Union, by email, of any store reopening at least seven days before recall is scheduled to begin. The parties agreed to create three lists of employees based on employee's individual requests as to whether or when they desired recall. The first list, called the active recall list, consisted of employees who stated a preference to return to work immediately. The second list, the waitlist, contained those employees who desire to return to work at the Employer at some point in the future. The third list consisted of those employees who chose not to return to work at the Employer at any time. Specifically, the relevant portion of the COVID MOA with respect to this third list states that "Unit members listed on (the third list) will not be returning to work at Gimme Coffee and will not be

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<sup>9</sup> Christensen testified that Cayuga had a ductless mini-split system, and as such, there was no filter.

<sup>10</sup> Cornell students essentially double the population area.

considered for recall.” The three lists were each ordered by company-wide seniority. The parties envisioned that when positions became available, they would first consult the active-recall list, referred to Appendix B, and fill positions accordingly. If, or when, additional positions became available, the employees on the waitlist, referred to as Appendix C, would be contacted in the order in which their name appeared on the list. If positions are still not filled, the Employer can hire off the street.

The parties fully executed the COVID MOA by August 28. Appendix B of the COVID MOA, the active recall list, listed 14 employees and the locations at which they preferred to be recalled. Appendix C, the waitlist, contained 18 names, including nine of the employees whose ballots are the subject of this proceeding. Brittany Cuhna, the tenth employee whose ballot is at issue in this proceeding, appears on Appendix D, the not-returning-to-work list.

The COVID MOA does not specify a termination date of recall rights for those on the waitlist. At the hearing, the parties stipulated that Burger, Eginton, Feberwee, Lespier, Lukosovich, Mailloux, Mason, Sanchez, and Yajko possessed recall rights as defined in the COVID MOA as of January 31, 2021.

By the end of August, the Employer decided the transition from summer to fall necessitated an increase of staff with the attendant increase in time it takes to steam milk for hot drinks rather than pouring milk into cold drinks. Thus, the Employer sought to recall a total of 14 full-time baristas at the three stores.<sup>11</sup>

The two phase reopening process was condensed into one phase due to the length of time it took to negotiate the COVID MOA. By the end of September, the Employer recalled 14 full-time employees to MLK, Trumansburg, and Coco in accordance with the hiring plan outlined during the July 7 meeting.<sup>12</sup> Christensen testified without contradiction that the Employer was

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<sup>11</sup> While the active recall list contained 14 names, not all 14 employees on that list were recalled. One employee who was on the active recall list indicated that they did not wish to return to work and one employee who was initially on the waitlist, requested to be moved to the active-recall list.

<sup>12</sup> In September, two additional employees moved their names from the waitlist to the active recall list. These employees were not recalled at that time, or any time during the relevant time period, because there were no positions available.

committed to the pod model of full-time employees for any future café openings, and that there was no plan of recalling baristas on a part-time basis to any location.

Café and Layoff Statutes through the Election

*The December 28 meeting*

The collective bargaining agreement was set to expire on December 28. The Employer and the Union began successor negotiations in November. On December 28, the parties conducted a two-hour negotiation session by Zoom, the last session before expiration of the collective bargaining agreement. Christensen and Anunu represented the Employer at this meeting. Bonadonna, Bensinger, Lapinski, Baird and several other employees represented the Union at the meeting.

Lapinski testified the subject of recall came up that during the meeting. According to Lapinski, Christensen said the plan was to open Gates in February and Cayuga shortly after. On cross, Lapinski admitted that Christensen's comment did not equate to a formal (email) notice that Cayuga was going to open that would trigger the recall process in the COVID MOA. Lapinski also admitted on cross that Christensen communicated a problem with opening Cayuga: The HVAC did not have the proper filter system. Lapinski admitted Christensen stated that Cayuga's HVAC problem had not been resolved as of the date of the meeting and Christensen had not stated any plans to resolve it by February 2021.

Baird attested that during the meeting, Christensen said the Gates location on Cornell's campus would be opening in February and that the Cayuga Street location would be opening shortly after. On cross, Baird admitted that Christensen said that Cayuga opening was conditioned on fixing the HVAC system. Baird also admitted on cross to assuming the Employer had a plan in place to fix the HVAC but conceded that no details of the plan to fix it were discussed.

Bensinger testified that during the meeting he asked if the Employer had enough job openings to recall people from layoff. Bensinger stated that Christensen responded by saying that they were going to open Gates in early February, and shortly after that, they would be opening in Cayuga. Bensinger further testified Christensen added the Employer had to fix the HVAC system to get Cayuga open. Bensinger's recollection was that the reopening of two stores was "good news." On cross, Bensinger changed his testimony slightly. When asked by opposing counsel whether he remembered Christensen saying the reopening of Cayuga was conditioned on solving the HVAC infrastructure problem, Bensinger stated that Christensen's statement they would be

opening in Cayuga (shortly after Gates) was not equivocal or qualified by the HVAC needing to be fixed first.

Bonadonna attested that Christensen stated that the Employer was tentatively opening Gates and Cayuga in mid to late February. Bonadonna recalled Christensen saying there was a problem with Cayuga's HVAC system: that it either needed to be repaired or replaced. Bonadonna admitted on cross that neither Christensen nor Anunu described any solution to the HVAC problem.

After the four Union witnesses testified about the December 28 meeting, the Employer recalled Christensen and called Anunu on rebuttal to testify about the meeting. Christensen corroborated that the issue about Gates and Cayuga came up in response to Bensinger's question concerning recall. Christensen added that it came up toward the end of the meeting and she interpreted Bensinger's question to be about stores reopening. Christensen discussed there was a store manager position open at Gates at that time who would hopefully start in February. Christensen attested that she advised there was a possibility for full-time positions for re-openings sometime in the spring but there were currently no open (unit) positions. Christensen attested that she expounded on Cayuga by stating that they were hoping to reopen Cayuga Street, but that there was a problem with the HVAC system, for which they had no solution. Christensen referred to the then-current HVAC system as a "COVID-spreading tool" and that it was an infrastructure issue for reopening Cayuga. Christensen testified about the various people with whom she had discussed the HVAC problem, including the Employer's facilities manager and equipment specialist, none of whom had presented a viable solution.<sup>13</sup> Christensen stated that she did not recall saying during the meeting that Cayuga would open shortly after Gates.

Anunu testified that the Gates/Cayuga issue came up the last ten minutes of two months of bargaining. Anunu corroborated that the issue about Gates/Cayuga was in response to Bensinger's question concerning recall. Anunu stated that Christensen advised that the laid off employees could not be brought back at that time but that the Employer was rehiring a Gates Hall manager for February. Anunu stated that Christensen then said that hopefully, Cayuga Street would open in the future, but there is an HVAC issue, and they had no infrastructure solution for it.<sup>14</sup>

The Union's four witnesses testified similarly as to what Christensen said about Gates and

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<sup>13</sup> Christensen testified that repairs may cost up to \$20,000.

<sup>14</sup> Anunu corroborated that Christensen referred to this as a "COVID-spreading tool".

Cayuga opening. Christensen and Anunu's testimony on this topic differed from the Union's witnesses. Importantly, all witnesses corroborated the fact that Gates was going to open (in some capacity) in February and the HVAC was a problem Cayuga. As Christensen was the most knowledgeable about the factual circumstances surrounding the opening of these stores, I have given more weight to her testimony that Cayuga opening was contingent on the HVAC being fixed and that there was no solution at that time. While all four Union witnesses heard Christensen say there was an HVAC problem at Cayuga, they appeared to have not fully received Christensen's sentiment that the lack of resolution to the HVAC problem was an impediment to Cayuga opening.

*The January 26, 2021<sup>15</sup> Meeting*

Prior to COVID, Gates was staffed with two or three unit baristas and a manager. On January 26, the Employer conducted a retail operations meeting, during which employees were advised that Gates would reopen on February 8.<sup>16</sup> Employer representatives confirmed that Gates would be staffed with one manager and no unit baristas. The Gates reopening was referred to as a pilot program because there was no assurance that the location would remain open at all. Employer representatives explained that because the kiosk at Gates is so small, there is no way to safely staff it with more than one person. Employer representatives also explained that a new machine, called an Eversys, would be installed at Gates. This machine is fully automated and can be operated by one person. Managers create standard operating procedures (SOP) for the machines. An SOP had not yet been created for the Eversys, so the Gates manager would be charged with the operation of the machine and the creation of its SOP.

Between September 2020 and February 23, the Employer did not open Cayuga or staff MLK, CoCo, Trumansburg, or Gates with any additional unit baristas beyond that which is described above. As of the payroll period ending January 31, and the February 23 mailing of ballots, the nine employees whose ballots are at issue in this proceeding had been laid off for 10 months and remained on the wait list in layoff status with contractual recall rights.

**ANALYSIS**

In *NP Texas LLC*, 370 NLRB No. 11 (2020), the Board addressed the voting eligibility of laid-off employees during the COVID-19 pandemic. With respect to the relevant standard, the Board stated as follows, in pertinent part:

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<sup>15</sup> Hereafter, all dates are 2021 unless otherwise noted.

<sup>16</sup> Cornell had limited in-person learning in the spring semester of 2021.

“It is well established that temporarily laid-off employees are eligible to vote,” and that “[t]he voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff.” *Apex Paper Box Co.* [302 NLRB at 67, 68]. These factors include “the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.” *Id.* In order for employees to be eligible to vote, a reasonable expectation of recall must exist at the time of the payroll-eligibility period, regardless of whether the employees have been recalled by the date of the election. *Id.* Permanently laid-off employees--i.e., those laid off with no reasonable expectation of recall--are not eligible to vote. *Id.* at fn. 2.

With respect to the Employer's past practice concerning layoffs and recall, the record is devoid of any evidence the Employer laid off employees prior to March 2020. Thus, this factor neither weighs in favor nor against finding that the employees at issue had a reasonable expectation of recall.

In March 2020, the Employer closed the unit facilities and laid off all unit employees because COVID rendered the future of dine-in establishments uncertain. Thereafter, the Employer and the Union bargained a recall process for if and when the Employer reopened its locations. The negotiations resulted in the COVID MOA discussed above. The Union relies heavily on the COVID MOA providing for recall rights of an undetermined duration for its position that the nine employees had an expectancy of recall. However, the Board has held that the mere fact of continued seniority for laid-off employees does not entitle employees to vote. See *Higgins, Inc.*, 111 NLRB at 799, citing *Harris Products Company*, 100 NLRB 1036, 1039-1040 (1952); *Avco Manufacturing Corporation*, 107 NLRB 295 (1953). In an analogous situation, the Board in *Leach Corp.*, 121 NLRB 772, 773 (1958) stated that “any contractual recall rights that these employees may have had is not dispositive of their right to vote. Rather, the question is whether they had a reasonable expectancy of recall in the near future as of the date of the election.” For the reasons stated below, I find that the nine employees at issue in the instant proceeding did not possess this expectation of recall.

Given the interrelated nature of the Employer's future plans and what employees were told regarding potential recall, I address those two factors simultaneously. By September 2020, the Employer solidified its reopening plans for MLK, CoCo and Trumansburg, but the Employer's plans for Gates and Cayuga were questionable. Cornell was possibly going to end the Employer's lease at Gates and its small size created a challenge regarding how to safely staff it. Christensen

said the Employer hoped to open Cayuga, but that location presented a larger challenge: The HVAC system did not have the proper filtration system such that no person could safely occupy its space. After consultation with several people, some of whom suggested the resolution of the HVAC problem could cost thousands of dollars, the Employer advised the Union and employees of this infrastructure problem on December 28, 2020. Even if one were to credit the Union's witnesses, that Christensen said that Cayuga would open shortly after Gates, such an equivocal statement of this kind "expresses a possibility more likely expressed to lend hope to the laid off employee than to give a realistic assessment of [their] being recalled to work." *Sol-Jack, Co.*, 286 NLRB 1173, 1174 (1987). Thus, Christensen's statement does not provide an adequate basis for a finding of reasonable expectancy of recall. The undisputed fact is that there was no plan to fix Cayuga's HVAC—and thus no plan to open Cayuga—in December 2020 or at any time in the near future.

As of late January, the Employer had unequivocally advised employees that Gates would open in early February under a one-manager, no unit employee, staffing model. Cayuga remained closed throughout the relevant time period.

As the record fails to show that there was any plan to further staff MLK, CoCo, Trumansburg, or Gates with unit baristas, and no plan to open Cayuga at all, as of the payroll period ending January 31, I find that the nine laid-off employees had no reasonable expectancy of returning to work in the near future.

With respect to Brittany Cuhna, she placed her name on Appendix D of the COVID MOA, the not-returning-to-work list, with its attendant provision that anyone on that list will not be considered for recall. During the hearing, the parties stipulated that Cuhna did not possess a reasonable expectation of recall and is not an eligible voter. In the absence of record evidence contradicting the stipulation, I find that Cuhna had no reasonable expectancy of returning to work in the near future.

## **CONCLUSION**

Based on the foregoing, I recommend that the Employer's challenges to the ballots of Jenna Burger, Brittany Cuhna, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko be sustained and that their ballots not be opened and counted, and that a certification of results issue.

## **APPEAL PROCEDURE**

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Acting Regional Director of Region 3 by **November 8, 2021**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board's Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency's website ([www.nlrb.gov](http://www.nlrb.gov)), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Acting Regional Director by close of business 5:00 p.m. on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Acting Regional Director may allow, a party opposing the exceptions may file an answering brief with the Acting Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Acting Regional Director.

Dated: October 25, 2021

/s/ Neale K. Sutcliff

Neale K. Sutcliff  
Hearing Officer  
Region 3, National Labor Relations Board  
130 S. Elmwood Ave.  
Ste. 630  
Buffalo, NY 14202

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

**GIMME COFFEE, INC.**

**Employer**

**and**

**Case 03-RD-271639**

**COURTNEY SUSAN SHELTON**

**Petitioner**

**and**

**WORKERS UNITED LOCAL 2833**

**Union**

**ORDER GRANTING REQUEST FOR EXTENSION OF TIME  
TO FILE EXCEPTIONS**

On October 25, 2021, a Hearing Officer issued a Report on Challenged Ballots in the above referenced matter. A request having been filed by the Union for an extension of time to file exceptions to the Report on Challenged Ballots;

**IT IS HEREBY ORDERED** that the request is granted. The deadline for filing exceptions is extended to the close of business on **November 15, 2021**.

**DATED** at Buffalo, New York this 2<sup>nd</sup> day of November 2021.

\_\_\_\_\_  
/s/ Nancy Wilson  
NANCY WILSON  
ACTING REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 3  
Niagara Center Building, Suite 630  
130 South Elmwood Avenue  
Buffalo, NY 14202

**BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

In the Matter of:

<b>GIMME! COFFEE, INC.,</b>	)	
	)	
Employer,	)	Case No. 03-RD-271639
	)	
and	)	
	)	
<b>COURTNEY SUSAN SHELTON,</b>	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
<b>WORKERS UNITED LOCAL 2833,</b>	)	
	)	
Union,	)	

**GIMME! COFFEE, INC.'S OPPOSITION TO  
EXCEPTIONS OF THE UNION, WORKERS UNITED**

The Union's Exceptions amount to blaming the Hearing Officer for not taking administrative notice of information the Union did not raise at the hearing, and for drawing conclusions with respect to the credibility of the witnesses that do not favor the Union's position. It was up to the Union to bring to the Hearing Officer's attention information about the potential of the COVID-19 vaccine, which it now deems central to the case but did not apparently view as worth raising during the hearing itself. Moreover, the Hearing Officer explained the bases for her credibility determinations, which should not be disturbed unless *all* other evidence proves those determinations to be wrong. That is not the case here. The Union's Exceptions should be rejected and the Hearing Officer's October 25, 2021, Report on Challenged Ballots should be confirmed.

## BACKGROUND

Prior to the COVID-19 pandemic, the Respondent had a total of seven coffee shops, plus a separate bakery facility. Two coffee shops were in downtown Ithaca, New York, about  $\frac{3}{4}$  of a mile apart; one was on Cayuga Street,<sup>1</sup> and the other was on Martin Luther King Jr. Street. Another was in the nearby town of Trumansburg; another called “Community Corners” was located near Cornell University; and finally, the Respondent also had a kiosk in Gates Hall, a Cornell University building. There were two shops in New York City as well. Hearing Officer’s Report (hereinafter “Report”) at 4; Tr. 21-22. Before the pandemic, all were dine-in coffee shops with food service – even the Gates Hall kiosk on Cornell campus had a great deal of seating in the lobby. Report at 4; Tr. 22. Prior to the onset of the closures necessitated by the pandemic, about 66 percent of the Respondent’s baristas worked part time (*i.e.*, fewer than 30 hours a week) and about 33 percent of baristas were full time – over 30 hours a week. Report at 5; Tr. 22. In other words, there were about 20 full-time equivalent baristas at all Ithaca-area locations prior to the COVID closure, with a total of 32 active baristas. Tr. 22-23.

In March of 2020, as the COVID-19 pandemic swept the nation and the world, the Respondent decided to close all of its stores, because it did not have any idea at that time of how to operate safely for the sake of its employees or its customers. The two stores in New York City were closed first; the stores in and around Ithaca were closed about a week later. Report at 5; Tr. 23-24. The Ithaca-area stores closed effective March 25, 2020. Tr. 23-24. Because the future of the business was in doubt at that time, the Respondent elected to terminate all of its employees.

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<sup>1</sup> Prior to the COVID-19 pandemic, the Cayuga store was staffed by only two full-time workers; the rest (about 8-10) were part-time. Tr. 216-217.

Tr. 24-26; Exh. E-3; *see also* Exh. E-11 (list of all terminated baristas and lead baristas through January 31, 2021). By request from the Union, the Respondent agreed to send follow-up letters after the initial termination letters clarifying that the employees' termination was due to COVID-19, not to any wrongdoing on their part. Tr. 94-95. The Hearing Officer concluded that the termination letters, sent out on March 30, 2020, "were akin to layoff notices rather than permanent termination letters." Report at 5, n.6.

In April of 2020, the Respondent started to plan for delivery and an online-order-only program, which entailed having door service only at the MLK store and limited "pods" of people working with each other to limit potential exposure to the virus. Report at 5; Tr. 27-29.

After the March closure, the Respondent began to engage in "effects" bargaining with the Union. Tr. 48-49. The Union was concerned with making sure that former employees who did not want to return could keep their unemployment insurance; it therefore did not want them to have to turn down any job offers from the Respondent. *Id.* Thus, the initial proposal of going down the seniority list to make job offers was rejected. Tr. 49-50. The Union initially requested that the list of those who chose not to return not be shared with the unemployment bureau, but the Respondent felt uncomfortable with this, believing it could potentially amount to fraud. Tr. 50.

On July 7, 2020, the Respondent met with the baristas via Zoom to explain the plan for a partial reopening, providing them on July 10 with a copy of the Power Point presentation used to convey this information. Report at 5; Tr. 29-30. Exhs. E-6, E-7, E-8. Among other things, the Respondent informed them that the plan was to have only full-time employees working in small pods on the same schedule, again to limit the risk of virus transmission. Report at 5-6; Tr. 32-33. As of the July presentation, there was no timeline for opening Community Corners, Cayuga, or Gates Hall, as revealed by the question marks on the Power Point presentation slides. Tr. 39; Exh.

E-6. Moreover, the Respondent made it clear at that time that it would open *either* Community Corners or Cayuga Street as part of the second phase, but not both locations. Report at 5. At the time, Respondent told attendees it anticipated rehiring 10 baristas, all full-time and in pods. Report at 5-6; Tr. 42-43, 47-48. The Union initially complained about the recall plan not including any part-time positions, but it withdrew this complaint when the health and safety rationale was explained. Tr. 49.

The parties reached agreement in August of 2020, as reflected in Exh. E-4, the August 27 Memorandum of Agreement (“MOA”). Report at 6. The resolution of the above-referenced dispute over recall was that the Union would create two lists, a “ready to work” or “active recall” list and a “waitlist” of those who were not ready to return. After hashing out some details, the Respondent accepted those lists. Report at 6-7; Tr. 50-51. The MOA also identifies in Appendix D those who would not be returning to work with the Respondent and would not be considered for recall. Exh. E-4, top of page 3 of 5.<sup>2</sup> The MOA also specifically references the employees’ continued rights to whatever federal and state assistance was available: “Unit members will have the additional rights afforded under federal and state law, including FMLA, FFCRA, and ADA.” Exh. E-4. There is a requirement in the MOA for the Respondent to give notice to Union prior to any store reopening. Exh. E-4, p. 3, Item 4. The purpose of this was apparently to allow the Union to check with people to see about whether they wanted to return so they didn’t have to turn down a job offer, in order to preserve their right to unemployment compensation. Tr. 55.

The MOA included the active-recall list and the waitlist, as described in the MOA. These lists were not in order of seniority. “Almost everyone on the waitlist has higher bargaining-unit

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<sup>2</sup> The parties stipulated that one of the disputed voters, Britney Cunha, was on this list, and therefore did not have a reasonable expectation of recall and was not an eligible voter. Report at 7; Tr. at 10.

seniority than the last person on the active-recall list.” Tr. 52-53. The active recall list was in bargaining unit seniority order. Tr. 53. The active-recall list was exactly 14 people, which, as it turned out, corresponded precisely with the number to be recalled. Tr. 54.

Given the fact that it was summer, and Cornell had already announced that its Fall 2020 classes would be virtual only, Respondent had no reason to believe that business in Ithaca would be robust. Report at 6; Tr. 35-36. Gates Hall was on the Cornell campus, and staff from that building were mostly working from home. Tr. 36-37. Thus, Trumansburg and MLK were the first locations scheduled to open with the additional safety precautions, because social media indicated that a number of customers were interested in its return. Report at 6; Tr. 34-35; Exh. E-6, p. 9.

The Respondent ended up opening Community Corners next because that was the location, after Trumansburg and MLK, for which social media indicated the greatest continuing demand. Respondent opted for Community Corners over Cayuga Street for two additional reasons: Unlike its other locations, Cayuga’s HVAC system did not permit the addition of filters to reduce aerosol spread of the COVID-19 virus; and because it was relatively close to the MLK location, there was concern that Cayuga Street might poach customers from the other. Report at 6; Tr. 37-39.

By the beginning of September 2020, it was decided that a total of 14 baristas would be rehired because the fall season requires more steaming of milk than does the summer season; but the only locations to be staffed by baristas remained Trumansburg, MLK and Community Corners. Report at 7; Tr. 43-44. The original plan was to rehire in two phases, but everyone ended up getting hired within the same few weeks because Respondent wanted to reopen quickly and the people who wanted to return to work wanted to do so promptly. Tr. 45-46. Thirteen of the fourteen people on the active recall list were hired; one of them (Tim Brogan) indicated subsequently that

he could not return until his other job finished. 55-56, 67-68, Exh. E-14.<sup>3</sup> The other thirteen were rehired.

Two employees on the active recall list were actually rehired before the MOA was completed (Exh. E-5 and Tr. 63-64), but the rest were hired around early September; all of the rehiring was done within a 3-week period. Tr. 57-59. Another employee who had been on the waitlist informed the Respondent in early September via email that he wanted to return to work. Tr. 60-61. Exh. E-20 (Wendell Roth email). He was then rehired, and he was the last rehired. Tr. 61, 73. All of the baristas who were rehired began work by the end of September 2020. Tr. 59-60; Exh. E-10 (list of all baristas hired or rehired between January 2018 and January 2021).

According to Wendell Roth:

**Q** What caused you, if you recall, to make that decision [to move to the active-recall list]?

**A** Because I knew that State Street where I had worked, had been staffed and that they were staffing for Community Corners *and didn't have any plans for any other cafes at the time*, and I wanted to make sure that I secured a position for myself.

Tr. 117 (emphasis added).

**Q** ... [H]ow did you become aware of the fact that MLK or State Street had been fully staffed and you needed to put your name on that recall list if you were going to get in Coco or Community Corners. How did you learn of that?

**A** We had weekly Zoom meetings with Gimme! management (audio interference), and we had meetings within the Union. And then also reviewing the recall list, I was able to see who had been hired back where. And I heard in one of the Zoom meetings that they were hiring for State Street – I mean, for Community Corners.

**Q** Okay. And that's what caused you to send the email on September 7th?

**A** Yes.

Tr. 118.

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<sup>3</sup> Tim Brogan eventually texted to say he did not wish to return to work with the Respondent. Exh. U-10.

**Q** Did you have any concern that if you didn't put your name on the active list at – at the time that you did, September 7th, that there wouldn't be a position open for you?

**A** Correct. Yes. I had hesitations about coming back to work at that time with the COVID situation, but I didn't want to have to, you know, lose my position or wait *indefinitely*. So I decided to go back on.

Tr. 119 (emphasis added). Mr. Roth also informed other people on the Union's negotiating committee that he intended to move his name to the active recall list. Tr. 123-124. Notably, none of the nine challenged voters testified at the hearing.

The Respondent held a meeting with whole bargaining unit on September 9, 2020. Tr. 69-70; Exh. E-9 (update prepared for and presented at the meeting); *see also* Exh. E-19. At this meeting, the employees were told that the Respondent was going to recall all baristas on the active list by September 20. Tr. 86; Exh. E-16. Exh. E-9 represented the entire complement of baristas ultimately recalled. Tr. 71.

After the end of September, two more employees moved their names from the waitlist to the active recall list. They were not rehired because there were no positions available. Report at 7, n.12; Tr. 73-75; Exhs. E-21 and E-22. None of the people on the waitlist had been hired back as a barista as of January 31. Tr. 78. The Respondent considered the reopening to have been completed by the end of September 2020. *Id.*; Exh. E-10.

At the end of January 2021, Respondent was concerned that Cornell would end Respondent's lease at Gates Hall if Respondent didn't open the kiosk at all, so Respondent made plans to put in an automatic espresso machine that could be managed by a single employee. This was for safety reasons because the location is so small. Tr. 40-41. That single employee ended up being a manager because Respondent had no established procedures for using the new machine or how to handle ordering via QR codes. Tr. 41. There were still no plans at this time to open

Cayuga because of the same issues as before, to wit, the HVAC system and the uncertain level of demand. Tr. 42.

Other than adding door service in addition to online ordering and adding sliding windows (at a cost of \$5,000) to make this method of transaction easier, the Respondent's method of service and delivery to its customers remained the same through January 31. Tr. 62-63. The Respondent's staffing model likewise had not changed through the end of January 2021. Tr. 63.

The Respondent's model, which follows "best precautions", has been successful at avoiding COVID-19 transmission. Tr. 80-81. Only two COVID-19 cases have been reported, both incurred outside of the Respondent's stores, and none of the Respondent's other employees became infected, nor was the virus transmitted to any customers. The New York Department of Health didn't even bother to put out any notices to indicate that there was a risk of transmission to customers or advising customers who shopped there to quarantine and get tested. Tr. 81-82.

During the relevant time period, the Respondent held weekly meetings with the recalled baristas. The Respondent tried to have more meetings after September 9, 2020, for the whole bargaining unit, but only two people showed up to the first one, both individuals who did not desire to return to work. So the Respondent stopped holding unit-wide meetings at that point. Tr. 107-108.

**The December 28, 2020, negotiating meeting.** The entire basis for the Union's argument that the disputed voters had a "reasonable expectation of recall" is the assertion made by a few members of the negotiating committee that, at a meeting for a successor contract (not directly related to the recall), Claire Christensen told them that Respondent would be "opening Gates in February and Cayuga shortly thereafter." *See generally* Report at 8-10. Christensen vociferously denies characterizing the Respondent's plans that way. According to her, when she was asked at

negotiation meetings about reopening Cayuga, she repeatedly said that although Respondent loves the store, it had no plans to reopen it at that time. “We had no scheduling, no plans, nothing built, and also we were concerned about the HVAC issue in addition to the build and demand issue.” Tr. 77, 78, 83; *see also* Tr. 202-203. She and Colleen Anunu both testified that she referred to the Cayuga HVAC system as a “COVID-spreading tool”, and that as of December 28, 2020, the Respondent had not found a solution to the problem. Tr. 197-198, 221. She also explained that the reason she mentioned the infrastructure problem at Cayuga was not to suggest that there would be more positions opening up once it was solved, but to explain the opposite: *i.e.*, here is the situation and it was unknown when it would change. Tr. 214. The Hearing Officer concluded, “While all four Union witnesses heard Christensen say there was an HVAC problem at Cayuga, they appeared to have not fully received Christensen’s sentiment that the lack of resolution to the HVAC problem was an impediment to Cayuga opening.” Report at 10.

Christensen also told them that there were no plans to add baristas to the Gates kiosk because there was no way to do so safely. As of January 31, 2021, the Respondent had no plans to have a barista work at Gates again. Tr. 83-84, 100. In fact, she told the Union that the Respondent might not retain the lease on the Gates kiosk. Report at 6, 10; Tr. 98.

Nobody from the Union denies that Christensen referenced the HVAC problem at Cayuga at the December 28 meeting or claims that the Respondent indicated it had a plan in place to solve that problem anytime prior to January 31, 2021. Tr. 157-158, 165-166, 173, 187, 192-193. The Union clearly did not regard Ms. Christensen’s asserted statement as official notice that the store was reopening, as proved by the fact that it did not follow up with people on the waitlist to see if they wanted to return to work, which the MOA requires the Union to do upon receiving notice of a store reopening. Tr. 154-155. It is undisputed that through January 31, 2021, the Respondent

never sent a 7-day notice email saying it was reopening another store. Tr. 162-163. What's more, the subject of a potential reopening of the Cayuga store was never raised in all of the meetings the Respondent had in January 2021 with its managers until January 27. Tr. 205-207; Exh. E-24. At a meeting on January 27, when the subject did come up, the notes of the meeting show the following entries: "Bunch of things that need to be worked through before we can open," and "Likely pushed back later than March. No solid plan yet." Exh. E-25. In short, regardless of what the Union witnesses claim to have thought Ms. Christensen said, the overwhelming evidence is that the Respondent in fact had no plans to reopen the Cayuga store or to add any baristas to the Gates kiosk as of January 31, 2021, or for some time thereafter.<sup>4</sup>

## ARGUMENT

### A. The Union's Belated Submission of Hearsay Information Regarding the COVID-19 Vaccines is Not Appropriate for Administrative Notice, Particularly Since the Union Entirely Failed to Raise the Subject of the Vaccine at the Hearing.

Pursuant to NLRB Rule 102.66(a) (emphasis added), "Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, *and to introduce into the record evidence of the significant facts that support the party's contentions* and are relevant to the existence of a question of representation and the other issues in the case that have been properly raised." *See also* Rule 102.69(c)(iii) (referencing Rule 102.66 for post-election hearings). In its Exceptions, the Union chastises the Hearing Officer for failing to take account of the advent of the COVID-19 vaccine when *the Union never introduced the subject at the hearing*, despite ample opportunity to do so. It is impossible to say

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<sup>4</sup> The Hearing Officer elicited testimony that the Cayuga store did not in fact open until July 4, 2021. Tr. 217. This is not directly relevant, per the Hearing Officer's ruling to that effect, but it does support the credibility of the Respondent's representatives' testimony that no plans were in place prior to January 31, 2021 to open the Cayuga store.

how the potential advent of COVID-19 vaccines affected the expectations of the challenged voters or the decisionmaking of the Respondent's managers, because the Union made no attempt to raise the issue of the vaccine during direct or cross-examination of witnesses at the hearing. Neither the Hearing Officer nor the Regional Director is obligated to take administrative notice of evidence introduced after the fact.

In any event, much of the information the Union asks to take administrative notice of is obvious hearsay without any support to make it admissible. "News accounts, unsupported by corroborating evidence and offered to prove that certain statements were made, will usually lack the 'circumstantial guarantees of trustworthiness' that [Federal Rule of Evidence] Rule 803(24) requires." *In re Columbia Sec. Litig.*, 155 F.R.D. 466, 475 (S.D.N.Y. 1994) (citations omitted).

Courts admitting evidence under 803(24) require some showing that the declarant's perception, memory, narration, or sincerity are reliable. Unsupported newspaper articles will normally fail on all of these grounds: Unless their author is available for cross-examination, newspapers stories generally will present a blank face that gives little clue as to the reliability of the reporter's perception, memory, narration, or sincerity, and in addition fails to disclose how the article was changed in the editing process.

*Id.* (citation omitted). The Union is now asking to take administrative notice of numerous news reports which it: 1) failed to ask the Hearing Officer to take administrative notice of during the hearing, at which time the parties could have debated their admissibility and the Hearing Officer could have made a ruling accordingly; 2) failed to provide corroborating evidence to support the information contained therein, and 3) perhaps most importantly, failed to elicit evidence that any of the managers whose decisions were at issue were aware of the information contained in them, or that the employees whose expectations were at issue were influenced by them. Whether or not the information is hearsay, the potential advent of a COVID-19 vaccine is relevant only if it were taken into account by the employees and/or the Respondent, a fact the Union has entirely failed to

establish. Indeed, the word “vaccine” does not appear at all in the transcript of the hearing. The Union’s Exceptions 5 and 6 should be rejected.

B. The Union’s Exceptions Amount Largely to Challenges to the Hearing Officer’s Credibility Determinations, Which Are Presumptively Accurate Barring a Preponderance of Evidence to the Contrary.

The Union’s exceptions attack the Hearing Officer’s ultimate conclusions, some of which were explicitly predicated on her credibility determinations as well as the evidence submitted at the hearing. The Union especially challenges the Hearing Officer’s decision to credit the testimony of Respondent witness Claire Christensen, supported by Colleen Anunu, over the inconsistent testimony of the Union witnesses, regarding what Ms. Christensen said at a meeting on December 28, 2020. *See* Report at pp. 8-9 (noting inconsistencies in the Union witnesses’ testimony). Based on her credibility determinations, the Hearing Officer concluded that the Union witnesses were hearing what they wanted to hear, rather than what was actually said: “While all four Union witnesses heard Christensen say there was an HVAC problem at Cayuga, they appear to have not fully received Christensen’s sentiment that the lack of resolution to the HVAC problem was an impediment to Cayuga opening.” Report at 10. Moreover, the Union acknowledges but dismisses the fact that there was no apparent solution to that problem, not only as of December 28, 2020, but as of January 31, 2021 (the last payroll date relevant to voter eligibility). *See* Union Exceptions Brief at p. 6 (“Regarding Cayuga, it apparently was taking more time than expected to work through the ‘[b]unch of things that need to be worked through before we can open.’ So the Cayuga reopening was ‘[l]ikely pushed back later than March’ – there was ‘No solid plan yet’.”). Without a solution to Cayuga’s problem on the horizon, the challenged voters could not have a “reasonable expectation of recall in the near future” hinging on the potential opening of the Cayuga store. It is

also worth noting that none of the nine voters whose ballots were challenged testified at the hearing.

In any event, it is the Hearing Officer's prerogative to draw conclusions about witness credibility based on her observation of the witnesses as they testify and their demeanor, especially on cross-examination. As the Board has said,

[I]t is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless a clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. As further stated by the Board in that case, the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Administrative Law Judge, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to an Administrative Law Judge's credibility findings insofar as they are based on demeanor.

*Lizdale Knitting Mills, Inc.*, 211 NLRB 966, 967 (1974). *See also Standard Dry Wall Prod., Inc.*, 91 NLRB 544, 544-545 (1950) (emphasis added) (“[A]s the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.”).

In short, the Hearing Officer reasonably concluded that the Respondent never told the employees, including the challenged voters, that there was any definite plan to open the Gates or Cayuga location so as to create any reasonable expectation of recall for the employees who had chosen not to put themselves on the recall list prior to September of 2020. And, as discussed below, a vague promise or prediction is not enough to create a “reasonable expectation of recall in the near future.”

C. The Apposite Cases Confirm the Hearing Officer’s Conclusion That the Challenged Voters Did Not Have a Reasonable Expectation of Recall in the Near Future.

The remainder of the Union’s arguments amount to assertions that the Hearing Officer should have drawn different conclusions from the evidence presented. In doing so, it avoids mentioning evidence that undercuts its conclusions and fails to cite to the most relevant cases. For example, the Union claims that the MOA created “indefinite” recall rights, but as the Hearing Officer more accurately stated, “The COVID MOA does not specify a termination date of recall rights for those on the waitlist.” Report at p. 7. This does not mean that the MOA gave the employees a “reasonable expectation of recall in the near future,” the required standard for a laid-off worker to be eligible to vote in an election. Nor does the Union cite a single case in which an agreement providing for unspecified recall rights was sufficient by itself to create a reasonable expectation of recall. *Cf. Leach Corp.*, 121 NLRB 772, 773 (1958) (“[A]ny contractual recall rights that these employees may have had is not dispositive of their right to vote. Rather, the question is whether they had a reasonable expectancy of recall in the near future as of the date of the election.”).

The only cases cited by the Union are all inapposite, especially when compared to recent cases that are directly on point. In *In Re Lanco Const. Sys., Inc.*, 339 NLRB 1048 (2003), the Board emphasized the fact that the employer had prospective business on the horizon and “there is no evidence that the Employer’s [temporary] lack of work resulted from a fundamental change or shift in its business.” *Id.* at 1049. The same cannot be said of the way Gimme! Coffee’s business model was affected by the pandemic. *Cf. Apex Paper Box Co.*, 302 NLRB 67, 69 (1991) (also cited by the Union), in which the Board agreed that the three challenged voters were ineligible to vote in the election, even though they had been recalled by the time it occurred, because as of the payroll eligibility date, the employer had suffered the loss of one of its facilities due to fire.

In *A L Invs. Orlando, LLC, d/b/a the Pavilion at Crossing Pointe*, 344 NLRB 582 (2005), the challenged voter had been repeatedly told that he would be recalled when hours picked up and the employer kept him on the payroll and did not take any action consistent with a conclusion that he had been terminated. The challenged voters here had been terminated almost a year earlier and intentionally chose not to put themselves on a recall list the previous fall. Notably, the Union also ignores the fact that Wendell Roth, who had switched himself from the waitlist to the recall list just before the September 2020 recall, testified at the hearing that he did so because he *knew* he was unlikely to get recalled otherwise. Tr. 117-119.

In *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983), the Board explicitly relied on the fact that the employer's business was cyclical in nature, and the challenged voter herself had been recalled from layoff on previous occasions. Neither of these factors applies here.

By contrast, the following much more relevant cases prove that the challenged voters here did not have a reasonable expectation of recall in the near future. In *NP Texas*, 370 NLRB No. 11 (2020), the employer casino was closed due to the pandemic and it was not clear when it would reopen. The employer provided termination notices, paid out accrued vacation, and otherwise treated the employees as if they had been terminated. "While the Employer's managers may have made statements suggesting that the laid-off employees would be recalled in late April, they made these statements in early March. By the time the employees were laid off on May 1, it was clear that the Employer had no idea of when (or whether) the Texas Station Casino would reopen and resume operations. ... Under such circumstances, the totality of the evidence indicates that the Employer cannot reasonably predict when Texas Station Casino will reopen or whether (much less when) any of the laid-off employees will be recalled or rehired. Combined with the May 1

termination letters to employees, there is no basis for finding that any unit employees have a reasonable expectation of recall at this time.” 370 NLRB No. 11, slip op. at 3.

In *Remington Lodging & Hospitality, LLC*, Case 32-RC-259953, Decision & Direction of Election (Oct. 22, 2020), the employees were likewise sent termination letters due to the COVID-19 pandemic, though the hotel in question did partially reopen and hire back a few employees within a month or two thereafter. However, the Regional Director concluded that with the industry still suffering from the pandemic, the likelihood of rehire for the remaining discharged employees was slim despite managers’ moderately optimistic communications with the employees, and the employer’s behavior was consistent with the permanent discharge of its employees:

Although the hotel has not ceased operation, it has greatly curtailed its normal operations due to the COVID-19 pandemic, and its future remains uncertain. Both here and in *NP Texas*, the COVID-19 pandemic resulted in a catastrophic impact on business and a layoff of all or almost all employees. Reflecting the unknown nature of the situation, in both cases managers and supervisors were optimistic and made statements regarding their hope that employees would be recalled soon. However, the pandemic has not been a short-term event, and in both this case and *NP Texas* a short-term layoff was followed by a permanent layoff in May. In both cases the employer continued to strike an optimistic tone regarding recovery, but employees were notified in writing that their employment status had ended. Further, actions taken were consistent with the usual practice when an employees’ employment ended. In *NP Texas* this included paying out vacation, requiring employees to return their uniforms, clean out their lockers, and provide COBRA information regarding employee insurance. In this case this involved cleaning out lockers, issuing final paychecks, and providing COBRA information.

*Remington, id.* at 6-7.

Similarly, in *Sea World of Florida, LLC*, Case 12-RC-257917 (Decision and Direction of Election, Sept. 9, 2020), <https://www.nlr.gov/case/12-RC-257917>, the closure of the employer’s parks due to the pandemic led to only a few of the unit employees being recalled for work; the rest did not have a reasonable expectation of recall:

The fluctuating pandemic conditions that are beyond the Employer's control make it essentially impossible for the Employer or the employees to predict when a further recall will be possible. In addition, the remaining furloughed employees have been laid off for almost six months now. In these circumstances, absent more specific information from the Employer as to whether or when they will be recalled, it cannot be said that the remaining furloughed employees who have not been recalled have a reasonable expectancy of recall in the near future. Rather, it appears that the Employer cannot predict when it will resume full operations or be able to recall the remaining employees in view of the pandemic.

*Id.* at 19.

Cases predating the COVID-19 pandemic likewise show that the employees here had no reasonable expectation of recall after September 2020 regardless of any optimistic statements the Union alleges were made by the Respondent. The employer in *Sol-Jack Co.*, 286 N.L.R.B. 1173 (1987), had experienced a decline in sales due to losing five of its six outside customers. An employee was informed by the company that he was being laid off "because of the company's lack of business and poor financial condition." *Id.* at 1173. At the time of his layoff, one of the owners of the company told the employee that "he might be back to work in 1 or 2 weeks," although the company later told him that the layoff was permanent. *Id.* In determining that the employee did not have a reasonable expectation of recall, the NLRB focused on the deteriorating financial condition of the company and the employee's testimony regarding his own lack of work while employed, and found that these factors outweighed the owner's statement indicating he might be back to work in 1 or 2 weeks (which it determined was a "vague statement" meant to "lend hope to the laid-off employee [rather] than to give a realistic assessment of his being recalled to work"). *Id.* at 1173-1174. ***"When the objective factors involved indicate a laid-off employee had no reasonable expectancy of recall, vague statements by the employer about the chance or possibility of the employee being hired will not overcome the totality of the evidence to the***

*contrary.*” *Id.* (emphasis added). The same can be said of the alleged statement by Claire Christensen about the potential for opening the Cayuga store in the spring of 2021.

In *NLRB v. Ideal Macaroni Co.*, 989 F.2d 880 (6th Cir.1993), there was a declining need for employees due to a resolution of previous manufacturing problems, which caused Ideal to lay off three employees in March 1986. *Id.* at 880. Ideal told the employees to return their uniforms and clean out their lockers, and paid the employees for one week of vacation, even though the employees were not yet entitled to that vacation. According to testimony before the NLRB, one employee, upon being told that she would get paid for vacation, told her supervisor: “That sure tells me that we aren’t coming back.” In response, her superior stated that the layoff was supposed to be temporary. In addition, that employee and another testified before the NLRB that they were told that they would be called back to work in July to help with the annual cleaning of the plant. *Id.*

The Sixth Circuit nevertheless concluded that the employees did not have a reasonable expectation of recall. *Id.* at 882. It based its decision on the company’s business reason for the layoffs, the fact that no one was hired to replace the laid off employees, and the fact that all of the employees were recent hires in a workplace that required fewer and fewer employees. *Id.* As to the employees’ testimony that their supervisors indicated they would be called back to work, the Court concluded that the statements were “certainly inconsistent with the actual employment facts, and were, at best, vague and ambiguous ....” *Id.* at 883. *See also In Re RCC Fabricators, Inc.*, No. 4-CA-31757, 2003 WL 22454433 (NLRB Div. of Judges Oct. 23, 2003) (layoff due to unexpected loss of business supported conclusion that there was no reasonable expectancy of recall, and manager’s statement that he would hire the employees back if he could find work for them did not provide a reasonable expectation of rehire); *a+b Hvac Servs., Inc.*, No. JD(NY)-44-

13, 2013 WL 5305832 (NLRB Div. of Judges Sept. 19, 2013) (objective economic factors did not support likelihood of recall, and alleged statements by managers that “when things pick back up, we’ll give you a call” did not provide employees with reasonable expectancy of recall), citing *In Re MJM Studios of New York, Inc.*, 338 NLRB 980, 981 (2003) (employees had no reasonable expectancy of recall when economic factors drove their layoff and “vague statements” about the possibility of recall did not provide reasonable expectation) and *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998) (employees told that their chances for recall “depended” since “things could change” did not have reasonable expectation of recall); *Foam Fabricators*, 273 NLRB 511, 512 (1984) (“The statement by the Employer, that it was ‘compelled to lay [Ross] off at this time,’ is nothing more than a vague implication that Ross may eventually be recalled and is insufficient to give rise to a reasonable expectation of recall in the near future.”); *Tomadur, Inc.*, 196 NLRB 706, 707 (1972) (where manager told laid-off employee to look for work elsewhere, the allegation that the employee was also told there was “no reason” why he might not come back in the future did not provide an adequate basis for concluding that he had a reasonable expectancy of reemployment).

In *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001), Seawin suffered financial consequences as a result of its inefficient evaluation of inventory and loss of key customers, which necessitated laying off seventeen production workers in January 1998. A management official used words like “hopefully” or “probably” to indicate they might be called back in two weeks to a month. Six of the seventeen laid-off employees were eventually recalled to replace employees who quit or were terminated. *Id.* at 553-554.

In applying the NLRB factors in that case, the Sixth Circuit noted that shortly after the layoff, Seawin modernized its production processes, which led to a decreased need for the type of

services the laid off workers previously provided, and concluded that “[t]his change in the nature of Seawin’s business deprives the laid-off employees of a reasonable expectancy of recall.” *Id.* at 555-556. Similarly here, the change in processes adopted by the Respondent to cope with the COVID-19 pandemic are still in place and made it unlikely that most of the terminated employees, many of whom worked primarily part-time, would be recalled. In September 2020, the Respondent rehired only those employees who were willing to work full-time in employee “pods.”

The court in *Seawin* then went on to consider what the employees were told about the likelihood of recall. Noting the statements set forth above that were attributed to Seawin management, the Court concluded that “the objective circumstances surrounding the layoffs, *i.e.*, the declining sales, building inventory, eroding customer base, and increasing automation do not support a reasonable expectation of recall” and, accordingly, “equivocal statements by the vice-president of Seawin suggesting the possibility of recall do not ‘provide an adequate basis for concluding that an employee had a reasonable expectancy of recall.’” *Id.* at 558 (quoting *Sol-Jack*).

Finally, the Court looked at the future plans of the employer. In so doing, the Court considered it significant that Seawin had consistently maintained the number of employees with which it operated, since the time it laid off the plaintiffs, while at the same time improving its efficiency, thus indicating that the need for the laid off workers had not increased in the months after the layoffs. *Id.* at 558-559. In conclusion, the Court found that the plaintiffs did not have a reasonable expectation of recall.

The same is true here, where the Respondent consistently communicated to its rehired baristas and to the Union from July 2020 through January 31, 2021 that it did not intend to modify its full-time barista requirement working in employee pods. This model was a proven success at

preventing any COVID outbreaks amongst the employees, and management told everyone that the full-time model was there to stay. Like the employer in *Seawin*, the full-time model implemented by the Respondent in response to the COVID pandemic reduced the number of baristas necessary to staff the locations, making it highly unlikely that more than the 14 baristas on the active recall list as of September 2020 would be offered rehire. It was exactly for this reason that employee Wendell Roth took his name off the waitlist and placed himself on the active recall list on September 7, 2020, making him the last barista to be offered rehire. Notably, the Respondent's full-time staffing model remains in place to this day. *Accord Bledsoe v. Emery Worldwide Airlines, Inc.*, 2009 WL 3127740 (S.D. Ohio Sept. 28, 2009), *aff'd*, 635 F.3d 836 (6th Cir. 2011) (using NLRB standard for "reasonable expectation of recall" in WARN case and concluding that the plaintiffs did not have a reasonable expectation of recall, primarily because the company's certification by the Federal Aviation Administration remained in doubt and expectations continued to change).

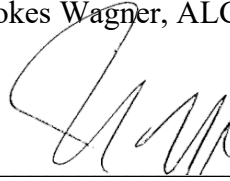
In the present case, from July 2020 through January 2021, the Respondent Gimme! Coffee accurately and consistently communicated to its rehired baristas, former baristas and to the Union that it would offer rehire only to 10-14 full-time baristas due to the substantially modified staffing model for its three open Ithaca locations. General statements by Claire Christensen regarding the future possibility of the Cayuga Street location opening were aspirational at best, and at all times qualified by a need to resolve a dangerous employee safety issue – the HVAC system – for which no solution had been found as of January 31, 2021.

## CONCLUSION

The Hearing Officer's conclusion that the challenged voters had no reasonable expectation of recall in the near future as of January 31, 2021, is well-supported and should be confirmed.

Dated: November 22, 2021

Stokes Wagner, ALC.

A handwritten signature in black ink, appearing to read 'P. E. Wagner', is written over a horizontal line.

Paul E. Wagner  
pwagner@stokeswagner.com

*Attorney for Gimme! Coffee, Inc.*

*Gimme! Coffee v. Workers United Local 2833*  
National Labor Relations Board, Case No. 03-RD-271639

I am employed with the law firm of Stokes Wagner ALC, whose address is 903 Hanshaw Road, Ithaca NY 14850. I am over the age of eighteen years, and am not a party to this action.

On November 22, 2021, I caused to be served the following document(s) described as:

- **RESPONDENT'S OPPOSITION TO THE EXCEPTIONS OF THE UNION, WORKERS UNITED**

on the interested parties in this action by the means designated below:

☒ **BY ELECTRONIC FILING** – By serving the above-described document(s) by email to the parties and their counsel of record:

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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on November 22, 2021 at Ithaca, New York.

  
\_\_\_\_\_  
LYNNE INGALL  
Employee at Stokes Wagner, ALC

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

**GIMME COFFEE, INC.**

**Employer**

**and**

**Case 03-RD-271639**

**COURTNEY SUSAN SHELTON**

**Petitioner**

**and**

**WORKERS UNITED LOCAL 2833**

**Union**

**ACTING REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON  
CHALLENGED BALLOTS AND CERTIFICATION OF RESULTS**

Pursuant to a petition filed by Courtney Susan Shelton, an Individual (Petitioner) on January 22, 2021,<sup>1</sup> and pursuant to a Stipulated Election Agreement, an election was conducted on February 23, 2021 among employees employed by Gimme Coffee, Inc. (Employer) during the payroll period ending January 31, 2021 in the following bargaining unit:

All full-time, part-time, and variable hour employees with the job title "Barista" including Lead Baristas, employed by Gimme! Coffee at its facilities in Ithaca and Trumansburg, excluding store managers, confidential employees, professional employees, and supervisors as defined in the National Labor Relations Act, and all other non-barista employees.

After the hearing concluded, the tally of ballots prepared at the conclusion of the election showed that of the approximately 31 eligible voters who cast votes, 4 votes were cast for and 7 votes were cast against Workers United Local 2833 (the Union), with 10 challenged ballots, a number that is sufficient to affect the results of the election.<sup>2</sup> On March 23, the Union timely filed one objection to conduct affecting the results of the election, which was overruled by the Acting Regional Director. The Region issued its Decision Overruling Objection and Order Directing

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<sup>1</sup> All dates hereinafter are in 2021 unless otherwise indicated.

<sup>2</sup> The ballots of voters Jenna Burger, Brittany Cuhna, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko were challenged at the election on the basis that they were no longer employed by the Employer due to not having a reasonable expectation of recall.

Hearing and Notice of Hearing on Challenged Ballots and scheduled a hearing to take place by videoconference on the remaining issue of the challenged ballots on September 2.

The Region conducted a hearing on September 2 and 3, and both parties were provided an opportunity to call witnesses, elicit testimony, and enter evidence into the record. Post-hearing briefs were also filed by the parties stating their respective legal positions. Based on that record, the Hearing Officer issued a Hearing Officer's Report on Challenged Ballots (the Report) on October 25, recommending that the Employer's challenges to the ballots of Jenna Burger, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko be sustained and that their ballots not be opened and counted, and that a certification of results should issue.<sup>3</sup>

The nine challenged ballots at issue in this proceeding were all challenged on the same basis, namely, that the voters were no longer employed by the Employer due to having been laid off and that they did not have a reasonable expectation of recall. After a hearing, the Hearing Officer issued their report and recommended the challenges be sustained for all nine challenged ballots.

After careful review of the evidence and hearing transcript, the Report and the parties' filings, I conclude that the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>4</sup> I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the hearing officer and affirm her recommendation that the challenges raised to the ballots in this case be sustained, that their ballots not be opened and counted, and that a certification of results should issue.

## **I. SUMMARY OF EVIDENCE AND HEARING OFFICER'S FINDINGS OF FACT**

The Employer operates retail establishments, also referred to as cafés, that serve coffee, food, and other beverages. The Employer is primarily based in Ithaca, New York, with four cafés in Ithaca, and one café in Trumansburg, New York. Two of the four cafés are in downtown Ithaca less than three-quarters of a mile apart from each other and are referred to as Cayuga and Martin Luther King Jr. Street (MLK). The remaining Ithaca locations are either close to Cornell University or on the university's campus: One café is in a location called Community Corner (CoCo) and the other establishment is in a Cornell building called Gates Hall (Gates). The Trumansburg café is located about 25 minutes outside of Ithaca. All cafés aside from the Gates store are dine-in. Gates is a small kiosk with lobby seating.

The Employer and the Union negotiated a collective bargaining agreement effective from December 28, 2017 to December 28, 2020. Much like the rest of the country, the COVID-19

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<sup>3</sup> Neither party filed an exception to the hearing officer's finding that voter Brittany Cunha was properly challenged and that the challenge should be sustained based on an agreement by the parties. Therefore, I adopt pro forma the recommendation to sustain the challenge and not open her ballot.

<sup>4</sup> The hearing officer's conclusions, credibility findings, and evaluation of the evidence in the record are correct by a clear preponderance of all relevant evidence, which is the standard for reviewing the report. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

pandemic struck the Ithaca area in March 2020. At that time, the Employer employed approximately 32 bargaining unit baristas. Most of the unit employees worked part-time. The parties define “part-time” employees as those working less than 30 hours a week. Full-time employees are those who work 30 or more hours per week. By March 26, 2020, the Employer concluded that it was not feasible to keep their retail stores open and closed all its stores. The Employer laid off its bargaining unit baristas through a form letter dated March 30, 2020. The Employer does not contend that the employees’ employment relationship was completely severed as a result. Instead, the record reflects that these letters were akin to layoff notices rather than permanent termination letters.

In early April 2020, the Employer piloted a delivery and online-order-only program. The Employer reconfigured the space of the MLK café and purchased new equipment to provide social distancing among staff and customers. The Employer employed a staffing model in which two separate teams, called pods, worked together. The Employer did not staff MLK with unit employees at the time.

Finding success with the MLK pilot program, the Employer concluded that it would more fully staff the MLK café and explore a limited reopening of two additional stores with unit baristas. On July 7, 2020 supervisors Claire Christensen (Christensen) and Colleen Anunu (Anunu) conducted an operations update meeting via Zoom videoconference for unit employees. Employer representatives conveyed the COVID safety precautions at the open locations and explained a tentative, two-phase schedule for reopening two additional cafés. Trumansburg was identified as one of the cafés slated for reopening. The Employer told attendees that one of two cafés would be the second site to be reopened: CoCo or Cayuga. The Employer explained that only one of these two locations would be reopening, and that there were no further plans to reopen the location that was not selected. Employer representatives discussed how many baristas were expected to be recalled at each reopened location.

Employer representatives further announced at the July 7, 2020 meeting that it was changing its staffing model to entirely full-time employment to ensure that staff were exposed to the fewest people possible. The Employer’s plan was to schedule everyone in a pod for the same full-time schedule with the same coworkers. Employer representatives advised that there would be pods of two baristas at Trumansburg and at either Cayuga or CoCo. At MLK, there would be a pod of three baristas with a fourth barista serving as a delivery driver. Employer representatives advised that they would be rehiring ten baristas for the phased reopening of the three stores.

Cayuga was the Employer’s oldest café and original location. Throughout the pandemic, Christensen and Anunu repeatedly stated to employees that they really liked the Cayuga location, including the space and the store itself. The record reflects that these positive feelings were shared by unit employees as well. Ultimately, the Employer decided to open CoCo rather than Cayuga, reasoning that Cayuga’s proximity to MLK could lead to a loss of sales at MLK. The Employer also asserted that Cayuga’s HVAC system did not possess a filtration system. Christensen testified that Cayuga had a ductless mini-split system, and as such, there was no filter. Christensen testified she was concerned a lack of a filtration system would endanger staff and customers. The Employer decided to reopen Trumansburg in response to robust social media requests. As of the summer, there was no plan to reopen Gates because Cornell had decided classes would be held virtually with no in-person learning, which greatly reduced the number of customers in the area. There was

also a question as to whether Cornell would allow the Employer to retain its lease at the Gates location.

Between July and August 2020, the parties engaged in bargaining over the effect of the pandemic on unit employees. The agreement reached by the parties, called “the COVID MOA,” was intended to amend the collective bargaining agreement with respect to layoff and recall during the pandemic. Regarding recall, the agreement provides, in part, that the Employer advise the Union, by email, of any store reopening at least seven days before recall is scheduled to begin.

The parties agreed to create three lists of employees based on the employees’ individual requests as to whether or when they desired recall. The first list, called the active recall list, consisted of employees who stated a preference to return to work immediately. The second list, the waitlist, contained those employees who desire to return to work at the Employer at some point in the future. The third list consisted of those employees who chose not to return to work at the Employer at any time. Specifically, the relevant portion of the COVID MOA with respect to this third list states that, “Unit members listed on (the third list) will not be returning to work at Gimme Coffee and will not be considered for recall.” Each of the three lists were ordered by company-wide seniority. The parties envisioned that when positions became available, they would first consult the active-recall list, referred to as Appendix B, and fill positions accordingly. If, or when, additional positions became available, the employees on the waitlist, referred to as Appendix C, would be contacted in the order in which their name appeared on the list. If at that point positions were still not filled, the Employer could hire from the public.

The parties fully executed the COVID MOA by August 28, 2020. Appendix B of the COVID MOA, the active recall list, listed 14 employees and the locations at which they preferred to be recalled. Appendix C, the waitlist, contained 18 names, including 9 of the employees whose ballots are the subject of this proceeding. The COVID MOA does not specify a termination date of recall rights for those on the waitlist. At the hearing, the parties stipulated that Burger, Eginton, Feberwee, Lespier, Lukosovich, Mailloux, Mason, Sanchez, and Yajko possessed recall rights as defined in the COVID MOA as of January 31, 2021.

By the end of August 2020, the Employer decided the transition from summer to fall necessitated an increase of staff with the attendant increase in time it takes to steam milk for hot drinks rather than pouring milk into cold drinks. Thus, the Employer sought to recall a total of 14 full-time baristas at the three stores. While the active recall list contained 14 names, not all 14 employees on that list were recalled. One employee who was on the active recall list indicated that they did not wish to return to work and one employee who was initially on the waitlist, requested to be moved to the active-recall list.

The two-phase reopening process was condensed into one phase due to the length of time it took to negotiate the COVID MOA. By the end of September 2020, the Employer recalled 14 full-time employees to MLK, Trumansburg, and Coco in accordance with the hiring plan outlined during the July 7, 2020 meeting. In September, two additional employees moved their names from the waitlist to the active recall list. These employees were not recalled at that time, or any time during the relevant period, because there were no positions available. Christensen testified without contradiction that the Employer was committed to the pod model of full-time employees for any future café openings, and there was no plan of recalling baristas part-time to any location.

The collective bargaining agreement was set to expire on December 28, 2020. The Employer and the Union began successor negotiations in November 2020. On December 28, 2020, the parties conducted a two-hour negotiation session by Zoom, the last session before the expiration of the collective bargaining agreement. Christensen and Anunu represented the Employer at this meeting. Gary Bonadonna (Union Manager), Richard Bensinger (Union Senior Advisor), Maggie Lapinski (employee), Jaime Baird (employee), and several other employees represented the Union at the meeting.

Lapinski testified the subject of recall came up that during the meeting. According to Lapinski, Christensen said the plan was to reopen Gates in February and Cayuga shortly after. On cross examination, Lapinski admitted that Christensen's comment did not equate to a formal notice that Cayuga was going to reopen that would trigger the recall process in the COVID MOA. Lapinski also admitted on cross examination that Christensen communicated a problem with opening Cayuga, namely, that the HVAC did not have the proper filter system. Lapinski admitted Christensen said that Cayuga's HVAC problem had not been resolved as of the date of the meeting and Christensen had not stated any plans to resolve it by February 2021.

Baird said that during the meeting, Christensen said the Gates location on Cornell's campus would be open in February and that the Cayuga Street location would open shortly thereafter. On cross examination, Baird admitted Christensen said Cayuga opening was conditioned on fixing the HVAC system. Baird also admitted on cross examination to assuming the Employer had a plan in place to fix the HVAC but admitted no details of the plan to fix it were discussed.

Bensinger testified that during the meeting he asked if the Employer had enough job openings to recall people from layoff. Bensinger stated that Christensen responded by saying that they were going to reopen Gates in early February, and shortly after that, they would be reopening Cayuga. Bensinger further testified Christensen added the Employer had to fix the HVAC system to get Cayuga open. Bensinger's recollection was that the reopening of two stores was "good news."

Bensinger changed his testimony slightly during cross examination. When asked by opposing counsel whether he remembered Christensen saying the reopening of Cayuga was conditioned on solving the HVAC infrastructure problem, Bensinger stated that Christensen's statement that they would be reopening Cayuga (shortly after Gates) was not equivocal or qualified by the HVAC needing to be fixed first. Bonadonna testified that Christensen stated that the Employer was tentatively reopening Gates and Cayuga in mid to late February. Bonadonna recalled Christensen saying there was a problem with Cayuga's HVAC system: that it either needed to be repaired or replaced. Bonadonna admitted on cross examination that neither Christensen nor Anunu described any solution to the HVAC problem.

After the four Union witnesses testified about the December 28, 2020 meeting, the Employer recalled Christensen and called Anunu on rebuttal to testify about the meeting. Christensen corroborated that the issue about Gates and Cayuga arose in response to Bensinger's question concerning recall. Christensen added that it came up toward the end of the meeting and she interpreted Bensinger's question to be about stores reopening. Christensen discussed that there was currently a store manager position open at Gates who would hopefully start in February. Christensen testified that she advised there was a possibility for full-time positions in the reopened

stores sometime in the spring, but there were currently no open bargaining unit positions. Christensen attested that she expounded on Cayuga by stating that they were hoping to reopen Cayuga Street, but that there was a problem with the HVAC system, for which they had no solution. Christensen referred to the then-current HVAC system as a “COVID-spreading tool” and that it was an infrastructure issue for reopening Cayuga. Christensen testified about the various people with whom she had discussed the HVAC problem, including the Employer’s facilities manager and equipment specialist, neither of whom presented a viable solution. Christensen testified that repairs may cost up to \$20,000. Christensen stated that she did not recall saying during the meeting that Cayuga would open shortly after Gates.

Anunu testified that the Gates/Cayuga issue came up the last ten minutes of two months of bargaining. Anunu corroborated that the issue about Gates/Cayuga was in response to Bensinger’s question concerning recall. Anunu stated that Christensen advised that the laid off employees could not be brought back at that time, but the Employer was rehiring a Gates manager for February. Anunu stated that Christensen then said that hopefully, Cayuga would open in the future, but there was an HVAC issue with no infrastructure solution. Anunu corroborated that Christensen referred to this as a “COVID-spreading tool.”

Prior to COVID, Gates was staffed with two or three bargaining unit baristas and a manager. On January 26, 2021, the Employer conducted a retail operations meeting, during which employees were advised that Gates would reopen on February 8. Cornell had limited in-person learning in the spring semester of 2021. Employer representatives confirmed that Gates would be staffed with one manager and no bargaining unit baristas. The Gates reopening was referred to as a pilot program because there was no assurance that the location would remain open. Employer representatives explained that because the kiosk at Gates is so small, there was no way to safely staff it with more than one person. Employer representatives also explained that a new machine, called an Eversys, would be installed at Gates. This fully automated machine can be operated by one person. Managers create standard operating procedures (SOP) for the machines. An SOP had not yet been created for the Eversys, so the Gates manager would be charged with the operation of the machine and the creation of its SOP.

Between September 2020 and February 23, 2021, the Employer did not open Cayuga or staff MLK, CoCo, Trumansburg, or Gates with any additional unit baristas beyond that which is described above. As of the payroll period ending January 31, 2021, and the February 23, 2021 mailing of ballots, the nine employees whose ballots are at issue in this proceeding had been laid off for 10 months and remained on the waitlist in layoff status with contractual recall rights.

## **II. THE UNION’S EXCEPTIONS AND MY DETERMINATIONS**

Below, I address the Union’s exceptions to the hearing officer’s report and recommendation to sustain the challenges to the nine ballots in question. The Union raised twelve exceptions to the Report, which I will attempt to group together where it is appropriate to do so:

### **Union Exceptions 1 and 2**

- 1. To the Hearing Officer’s finding, “that the nine laid-off employees had no reasonable expectancy of returning to work in the near future.” (H.O. 9, 12)**
- 2. To the Hearing Officer’s finding, “that Gimme had no plan to further staff MLK, CoCo, Trumansburg, or Gates with unit baristas, and no plan to open Cayuga at all, as of the payroll period ending January 31,” and/or the Hearing Officer’s implicit conclusion that the lack of a plan to reopen precluded a finding that the laid off employees had a reasonable expectancy of returning to work in the near future. (H.O. 12)**

I find no merit to Union Exceptions 1 and 2. As noted above, the hearing officer’s report recommends finding the challenged voters were not eligible to vote because they were laid off and had no reasonable expectancy of returning. Although these employees had general ‘recall rights’ through their Union, as of the payroll period ending January 31, and the February 23 mailing of ballots, the nine employees whose ballots are at issue in this proceeding had been laid off for 10 months and remained on the waitlist in layoff status. Those facts are not in dispute. The hearing officer relied on the Board’s reasoning in *NP Texas LLC*, for the proposition that the voting eligibility of such workers “depends on whether objective factors support a reasonable expectancy of recall in the near future[.]” *NP Texas LLC*, 370 NLRB No. 11, slip op. at 1 fn. 2 (2020), citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991).

Importantly, the hearing officer’s decision was sound and was based on objective factors. This included testimonial evidence from witness Christensen, that there was no imminent plan to hire at the stores which the company had already opened, and, critically, that the company had not committed to reopening Cayuga because its HVAC system needed a costly upgrade or replacement to ensure adequate ventilation amidst the ongoing COVID-19 pandemic. Although witnesses had differing recollections of the exact words used and whether Christensen explicitly conditioned reopening on fixing the HVAC system, the hearing officer’s conclusion that Christensen’s testimony was credible, and that the evidence in general supported finding no expectation of recall is a sound one. As the hearing officer noted, the statements in question were equivocal in nature and inadequate to create a reasonable expectation of a return to work in the “near future,” per the qualifications set forth by the Board. *Apex Paper Box Co.*, supra, 302 NLRB at 67. Additional testimony from Christensen and other employer witnesses such as Anunu, also corroborated the company’s position that it did not have an intent to reopen Cayuga and communicated that to the Union in its meeting on December 28, 2020. The hearing officer’s reasoning regarding additional staff being hired at other stores—namely the CoCo, Trumansburg, and Gates locations—was also well-reasoned, sound, and based on the record evidence about a shift from part-time work to “pod-model” full-time employment to reduce incidental exposure to COVID-19.

In reviewing the hearing officer's recommendations, I find her conclusions and application of the law and facts to be sound and based on a preponderance of the evidence and objective factors adduced by the parties at hearing. Consequently, I find no merit to Exceptions 1 and 2 for the reasons set forth above.

#### **Union Exceptions 3 and 4**

- 3. To the hearing officer's finding that, on the January 31, 2021 eligibility date, the HVAC problem was so severe as to preclude any reasonable expectation that the laid off employees had of returning to work at the Cayuga location in the near future. (H.O. 12)**
- 4. To the hearing officer's finding that it was an "undisputed fact ... that there was no plan to fix Cayuga's HVAC—and thus no plan to open Cayuga—in December 2020 or at any time in the near future." (H.O. 12)**

In Union Exceptions 3 and 4, the Union excepted to the hearing officer's finding that there was no plan in place to correct an HVAC problem at Cayuga in December 2020 or at any time in the near future, and that its issues precluded reopening the store. These exceptions do not have merit, and I find that the hearing officer's conclusions are based on sound objective evidence adduced during the hearing.

The hearing officer's conclusion that the store would not be reopened in the near future is supported in the record. Likewise, on the issue of whether any "plans" were actively being discussed to resolve HVAC problems—which might have reasonably led to the conclusion that reemployment in the near future was feasible—is simply unsupported from witness testimony. The testimony in the record, particularly that of witnesses Bonadonna and Christensen, both responded to several questions on the topic of the HVAC system at Cayuga. Both witnesses were consistent about there not being a specific plan to resolve the HVAC problems at the store rather than some general statements about a desire to fix problems in general. Multiple times throughout the record, several witnesses reiterated the same basic testimony that despite hearing about issues with the HVAC's suitability for conducting business during the pandemic, they had not heard of and had not been presented with any plan to resolve the issues in the near future. The hearing officer's conclusions on this point were sound and based on the evidence in the record. Consequently, I find no merit to Union Exceptions 3 and 4.

#### **Union Exceptions 5 and 6**

- 5. To the hearing officer's failure to find that the vaccination roll-out evidenced a reasonable expectancy that employees would be recalled in the near future.**
- 6. To the hearing officer's failure to take administrative notice of any facts regarding the Covid vaccinations and their likely effect on Gimme's need to recall employees.**

The Union claims in its fifth and sixth exceptions that the hearing officer failed to take judicial notice of "the vaccination roll-out," and other vaccine-related information despite the fact that it never raised any such issue or points during the hearing nor specifically requested her to do

so. After failing to raise these facts during the hearing, the Union first enumerated them as a list of six points in its post-hearing exceptions brief. I find no merit to Exceptions 5 and 6 for the reasons discussed below.

The Union is seeking to introduce new evidence into the record post-hearing by citing national newspaper articles and quotes about national vaccinations—many of which amount to physicians offering their personal opinions about the future—and asking the Region to adopt their statements and interpret them in the Union’s favor. Such forward-looking speculative statements hardly constitute the sort of objective provable fact normally raised through judicial notice. Likewise, there is no evidence that those sentiments would have been reasonably held by the parties in this case at the material time in question or how they would have been specifically relevant to the likelihood of reemployment for specific workers at a specific store in any specific part of the country at a given time, such that they would be appropriate for the application of judicial notice. I am specifically finding that even if judicial notice of a vaccination “roll-out” or other vaccine-related information was granted, it is too speculative to support the Union’s position regarding the nine challenged ballots and it would not alter our findings. Consequently, I find no merit to Exceptions 5 and 6.

#### **Union Exceptions 7 and 8**

- 7. To the hearing officer’s failure to credit Union witness testimony that on December 28, 2020, Christensen informed the Union witnesses that Gimme intended to reopen Gates in February 2021 and Cayuga shortly thereafter, especially because the Union witnesses’ testimony was corroborated by documents and Christensen’s testimony was not. (H.O. 8-10)**
- 8. To the hearing officer’s finding that, even if the Union witnesses were credited, Christensen’s statement, “expresses a possibility more likely expressed to lend hope to the laid off employees than to give a realistic assessment of [their] being recalled to work” and would “not provide an adequate basis for a finding of reasonable expectancy of recall.” (H.O. 12)**

The hearing officer spends significant time in the Report evaluating Christensen’s statement to employees about the Cayuga store and its HVAC issues. This evaluation includes examining the witnesses’ testimony on this subject. The Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all relevant evidence demonstrates that they are incorrect. *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 1, fn. 4 (2019), citing *Stretch-Tex Co.*, supra, 118 NLRB at 1361; see also *Island Hospitality Management II, LLC d/b/a Hampton Inn – Long Island Brookhaven*, 29-RC-235501, unpub. Board order issued Nov. 21, 2019 (2019 WL 7584372) (same). Considering the overall context, the weight given to the various pieces of evidence, and the testimony contained in the record, I find that the hearing officer’s findings and conclusions on this point were supported in the record and I adopt them. Consequently, I find no merit to Exceptions 7 and 8.

### **Union Exception 9**

- 9. To the hearing officer's crediting of Christensen rather than the Union's witnesses, because she was more "knowledgeable about the factual circumstances surrounding the opening of these stores," especially regarding Christensen's testimony that on December 28, 2020:**
- a. she told Union representatives that Gimme had, "a store manager position open at Gates at that time who would hopefully start in February"**
  - b. she told Union representatives that Gimme was, "hoping to reopen Cayuga Street, but that there was a problem with the HVAC system, for which they had no solution"**
  - c. she told Union representatives that, "the then-current HVAC system [w]as a 'COVID-spreading tool'" and**
  - d. Christensen, "did not recall saying ... that Cayuga would open shortly after Gates[.]" (H.O. 9, 10)**

In Exception 9, the Union references several portions of the transcript and claims that the hearing officer improperly "credited" witness Christensen rather than the Union's witnesses for the points enumerated in paragraphs (a) through (d) of the exception. Upon a review of the record and the hearing officer's report, I find no reason to overturn her credibility determinations and weighing of the evidence adduced at the hearing. The hearing officer's findings, including the weight she gave to Christensen's testimony, are supported by the overall record evidence. Consequently, for the reasons set forth above, I find no merit to Union Exception No. 9, including paragraphs 9(a) through 9(d).

### **Union Exceptions 10 and 11**

- 10. To the hearing officer's crediting of Christensen regarding her testimony that of the "various people" with whom Christensen discussed the HVAC problem, "none ... had presented a viable solution." (H.O. 9)**
- 11. To the hearing officer's crediting of Christensen regarding "her testimony that Cayuga opening was contingent on the HVAC being fixed and that there was no solution at that time." (H.O. 10)**

Union Exceptions 10 and 11 concern the hearing officer's description of the testimony by Christensen, Anunu, and various Union witnesses on whether the HVAC issue needed to be fixed before reopening and that at the time no "viable solution" was established. After reviewing the record in detail, I find that the hearing officer's conclusions are well-founded and supported by the evidence. I find that the hearing officer's conclusions about the testimony, her critical evaluation of the witnesses who appeared at the hearing, and her review of the entire record, meet the necessary standard of proof used in the context of a post-election hearing on challenged ballots.

Consequently, I concur with her findings, and find no merit to Exceptions 10 and 11 for the reasons set forth above.

### **Union Exception 12**

#### **12. To the hearing officer's crediting of Gimme's manager Anunu. (H.O. 9, 10)**

Upon a thorough review of the record, I conclude that the hearing officer acted reasonably and appropriately in her treatment of witness Anunu's testimony, including by referencing her testimony to corroborate that of other witnesses. The Union fails to state a basis for its exception to the hearing officer's report on this point. Consequently, I found no merit to Exception 12.

### **III. CONCLUSION**

Based on the above and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the Union's exceptions and arguments, I sustain the challenges to the ballots of Jenna Burger, Rachel Eginton, Bart Feberwee, Rebecca Lespier, Brenden Lukosovich, Ava Mailloux, Samantha Mason, Jesse Sanchez, and Ashley Yajko and I shall issue the Certification of Results of the election.

### **IV. CERTIFICATION OF RESULTS**

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots has not been cast for Workers United Local 2833 and that is not the exclusive representative of all the employees in the following bargaining unit:

All full-time, part-time, and variable hour employees with the job title "Barista" including Lead Baristas, employed by Gimme! Coffee at its facilities in Ithaca and Trumansburg, excluding store managers, confidential employees, professional employees, and supervisors as defined in the National Labor Relations Act, and all other non-barista employees.

### **V. REQUEST FOR REVIEW**

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **January 6, 2022**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy

of the request on the other parties and file a copy with the Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: December 21, 2021

**/s/ Nancy Wilson**

Nancy Wilson  
Acting Regional Director  
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